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In The

Supreme Court of the United States

STATE OF SOUTH DAKOTA; WILLIAM JANKLOW, Governor of South Dakota; MARK W. BARNETT, Attorney General of South Dakota; SCOTT PODHRADSKY, State's Attorney of Charles Mix County; HERMAN PETERS, Member of the Charles Mix, South Dakota, County Commission; BRUCE BAKKEN, Member of the Charles Mix, South Dakota, County Commission; JACK SOULEK, Member of the Charles Mix, South Dakota, County Commission; SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,

Petitioners,

v.

YANKTON SIOUX TRIBE, and its individual members; UNITED STATES OF AMERICA, on its own behalf and for the benefit of the Yankton Sioux Tribe; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER AN 1894 STATUTE RATIFYING AN AGREEMENT BETWEEN THE YANKTON SIOUX TRIBE AND THE UNITED STATES DISESTABLISHED THE YANKTON SIOUX RESERVATION (AS THE SOUTH DAKOTA SUPREME COURT HELD) OR WHETHER THE RESERVATION STILL EXISTS, CONSISTING OF MORE THAN 1,000 ACRES OF CEDED LANDS, CONTRARY TO THE PRECISE HOLDING OF THIS COURT IN *SOUTH DAKOTA V. YANKTON SIOUX TRIBE*, PLUS POTENTIALLY THOUSANDS OF OTHER SCATTERED AND NONCONTIGUOUS ACRES (AS THE EIGHTH CIRCUIT HELD).

PARTIES

Pursuant to the rules of this Court, *see* Supreme Court Rule 12.4, the caption to the Petition identifies as Petitioners each of the parties aggrieved in the four cases consolidated in the Eighth Circuit and identifies as Respondents the opposing parties in these cases. *See also* Stern and Gressman, *Supreme Court Practice* § 6.18 (7th ed. 1993). Scott Podhradsky has been substituted as the present State's Attorney of Charles Mix County.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING CERTIORARI 11

I. THE DECISION OF THE EIGHTH CIRCUIT SQUARELY CONFLICTS WITH THE SUBSEQUENT DECISION OF THE UNANIMOUS SOUTH DAKOTA SUPREME COURT 11

II. THE DECISION OF THE EIGHTH CIRCUIT CONFLICTS WITH DECISIONS OF THIS COURT AND ESTABLISHED INDIAN LAW JURISPRUDENCE 14

III. THE ISSUES RAISED BY THIS CASE ARE IMPORTANT AND RECURRING 26

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES CITED

Alaska v. Native Village of Venetie, 522 U.S. 520 (1998) 22, 24

Braxton v. United States, 500 U.S. 344 (1991) 13

Bruguier v. Class, 599 N.W.2d 364 (S.D. 1999) 11, 13

DeCoteau v. District County Court, 420 U.S. 425 (1975) ..... *passim*

Hagen v. Utah, 510 U.S. 399 (1994) 14

Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995) 26

Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993) 26

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) 27

Solem v. Bartlett, 465 U.S. 463 (1984) 22, 27

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) ..... *passim*

State v. Greger, 559 N.W.2d 854 (S.D. 1997) 5

Strate v. A-1 Contractors, 520 U.S. 438 (1997) 26

United States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975), *cert. denied*, 430 U.S. 980 (1977) 27

United States v. Pelican, 232 U.S. 442 (1914) 24

United States v. Roberts, 185 F.3d 1125 (10th Cir. 1999) 25

United States v. Stands, 105 F.3d 1565 (8th Cir. 1997), *cert. denied*, 522 U.S. 841 (1998) 25

TABLE OF AUTHORITIES – Continued

Page

Williams v. Lee, 358 U.S. 217 (1959) 26

Yankton Sioux Tribe v. Gaffey, 890 F.Supp. 878 (D.S.D. 1995) 6

STATUTORY REFERENCES

11 Stat. 743 (1859) 1

24 Stat. 388 (1887) 4

26 Stat. 795 (1891) 4

26 Stat. 1035 (1891) 15, 16, 17

27 Stat. 120 (1892) 4

28 Stat. 286 (1894) 2, 17

33 Stat. 254 (1904) 27

36 Stat. 440 (1910) 28

36 Stat. 448 (1910) 27

39 Stat. 969 (1917) 27

45 Stat. 1167 (1929) 21

18 U.S.C. § 1151 24

18 U.S.C. § 1151(a) 10

18 U.S.C. § 1151(c) 22, 24

25 U.S.C. § 331 4

25 U.S.C. § 467 25

28 U.S.C. § 1254(1) 1

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES:

S. Exec. Doc. No. 27, 53d Cong., 2d Sess. (1894) 4

S. Misc. Doc. No. 134, 53d Cong., 2d Sess., 1 (1894) 19

Stern and Gressman, *Supreme Court Practice* § 6.18 (7th ed. 1993) ii

Supreme Court Rule 12.4 ii

Wrend and Smith, *American Indian Law Deskbook* (2d ed. 1998) 26, 27

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled proceeding on August 31, 1999, insofar as the judgment and opinion find that the Yankton Sioux Reservation has not been disestablished.

OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 188 F.3d 1010 (8th Cir. 1999) and is reprinted in the Appendix (App.) at 1-49. The Memorandum Opinion and Order of the United States District Court for the District of South Dakota are reported at 14 F.Supp.2d 1135 and are reprinted at App. 50-113.

JURISDICTIONAL STATEMENT

The judgment of the Eighth Circuit was entered on August 31, 1999. The Eighth Circuit denied timely petitions for rehearing and suggestions for rehearing en banc on December 8, 1999. App. 114. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Treaty with the Yankton Sioux, 1858, ratified, 11 Stat. 743 (1859) is reprinted in the Appendix at 115-126.

The Agreement with the Yankton Sioux or Dakota Indians, in South Dakota, 1892, ratified, 28 Stat. 286, 314 (1894) is reprinted in the Appendix at 127-140.

INTRODUCTION

Three years ago, this Court granted certiorari to resolve a conflict between the South Dakota Supreme Court and the Eighth Circuit as to whether an 1894 statute that ratified an agreement between the Yankton Sioux Tribe and the United States diminished the boundaries of the Yankton Sioux Reservation. After briefing and argument, the Court concluded that the "cession" and "sum certain" language in the statute manifested an unmistakable intent to diminish the reservation. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344-45 (1998). The Court accordingly held that the lands ceded in the statute "were severed from the reservation," *id.* at 358, and that the Act was "readily distinguishable from surplus land Acts that the Court has interpreted as maintaining reservation boundaries." *Id.* at 345. The Court expressly left open, however, the question "whether Congress disestablished the reservation altogether." *Id.* at 358. Within one day of each other in the late summer of 1999, the South Dakota Supreme Court and the Eighth Circuit issued opinions on that very issue, and once again reached conflicting results. This petition asks the Court to resolve the conflict.[1]

[1] As used herein, the term "JA" refers to the Joint Appendix filed in the Eighth Circuit in the present litigation. The term "1995 Transcript" refers to the transcript of the original trial of

As in *Yankton Sioux Tribe*, 522 U.S. 329, the answer to the question presented will determine whether South Dakota has primary jurisdiction over activities occurring on the affected acreage within the state, or whether the Tribe and the federal government have primary jurisdiction. As long as the conflict among the courts persists, residents of the state and the competing sovereigns will not know whose laws and regulations govern. Review by this Court is needed to end this untenable situation.[2]

STATEMENT OF THE CASE

A. History of the Reservation.

This case once again brings to this Court's attention the facts related to the creation and cession of the Yankton Reservation. *See Yankton Sioux Tribe*, 522 U.S. at 333-40. In 1858, the United States entered into a treaty with the Yankton Sioux Tribe in which the Tribe "cede[d] and relinquish[ed]" substantial lands (App. 116) in exchange for the United States' "pledge[ ] to protect the Yankton Tribe in their 'quiet and peaceable possession' of this reservation," *Yankton Sioux Tribe*, 522 U.S. at 334, which was later surveyed and determined to encompass 430,405 acres. *Id.* at 334. Subsequently, under "pressure from westward-bound homesteaders, and the belief that

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this matter on April 3-7, 1995. The term "1998 Transcript" refers to the hearing after remand held on May 20, 1998.

[2] Petitioners have requested simply that certiorari be granted but, given the error below, summary disposition may also be appropriate.

the Indians would benefit from private property ownership," *id.* at 335, Congress passed the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. § 331 (commonly known as "the Dawes Act"). Pursuant to that Act, "each member of the Yankton Tribe received a 160-acre tract from the existing reservation, held in trust by the United States for 25 years." *Yankton Sioux Tribe*, 522 U.S. at 336. The allotment proceeded quickly. By 1890, 167,325 acres had been allotted under the Dawes Act; 95,000 additional acres were subsequently allotted under the Act of February 28, 1891, 26 Stat. 795. *Yankton Sioux Tribe*, 522 U.S. at 336. This left a surplus of approximately 168,000 acres of unallotted lands. In 1892, Congress enacted 27 Stat. 120, 137 (1892), which authorized funds "[t]o enable the Secretary of the Interior in his discretion to negotiate with any Indians for the surrender of portions of their respective reservations. . . . " In the same year, the United States appointed the Yankton Indian Commission. S. Exec. Doc. No. 27, 53d Cong., 2d Sess. (1894). Negotiations followed during which the parties equated the pending agreement with a contemporaneous Lake Traverse cession, *see* S. Exec. Doc. No. 27, 53d Cong., 2d Sess. at 54, 68, 71, which had resulted in disestablishment of that reservation. *See DeCoteau v. District County Court*, 420 U.S. 425, 445 (1975).

The agreement reached between the tribal members and the United States provided, in Article I, that the Tribe would "cede, sell, relinquish, and convey to the United States" all of its unallotted lands. App. 128; *Yankton Sioux Tribe*, 522 U.S. at 338. In Article II, the United States agreed to pay the Tribe $600,000, or $3.60 an acre. App. 129; *Yankton Sioux Tribe*, 522 U.S. at 338. As a result of the 1894 Act, the Tribe retained no land for itself. *See* App. 31,

95-96; 1998 Transcript 45-46; 1894 Agreement, Article I, App. 128-129 ("all the unallotted lands" ceded). Tribal members disposed of most of their allotments in a fairly short period of time. By 1930, the Yankton Indians owned only 43,358 acres. *State v. Greger*, 559 N.W.2d 854, 867 (S.D. 1997). By the time of trial, at least 85 percent or 222,000 of the original 262,000 acres of allotted land had been transferred in fee to non-Indians. *See Yankton Sioux Tribe*, 522 U.S. at 339; *see also* Ex. 168, JA 414 (map).

Among the lands "ceded" to the United States for payment in 1894 were lands described in Article VIII as occupied by the United States for "agency, schools, and other purposes," App. 132 (commonly known as the "agency" lands); Article VIII reserved the ceded agency lands from sale to settlers and held them in the name of the United States "until they are no longer required for such purposes." In 1929, Congress provided that the agency lands could be transferred to the Tribe, but only "when they are no longer required for agency, schools, or other purposes." Act of February 13, 1929, 45 Stat. 1167. In a 1934 opinion, the Solicitor of the Department of the Interior held that the United States had "permanently discontinued" the use of the lands and that they were "no longer needed for any of such purposes." Ex. 627, JA 572. He therefore held that the lands, which were thought to constitute approximately one thousand acres, belonged to the Yankton Sioux Tribe. *Id.*[3]

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[3] *See* note 8, *infra*, as to the actual date of transfer.

B. The First Round of Litigation.

The dispute over the status of the reservation was commenced by the Yankton Sioux Tribe after several South Dakota counties formed the Southern Missouri Recycling and Waste Management District for the purpose of constructing a municipal solid waste facility. The site acquired by the Waste District for a landfill was on land ceded in the 1894 Act. Believing that state regulations governed that land, the Waste District sought a state permit for the landfill. After state courts rejected environmental challenges to the permit, the Yankton Tribe filed suit in the United States District Court for the District of South Dakota seeking to enjoin construction of the landfill. The Waste District joined South Dakota as a third-party so that the state could defend its jurisdiction to issue the permit. The district court declined to enjoin the landfill project, but in the course of its opinion ruled that the 1894 Act did not diminish the reservation. *Yankton Sioux Tribe v. Gaffey*, 890 F.Supp. 878, 891 (D.S.D. 1995). A divided panel of the Court of Appeals for the Eighth Circuit affirmed, relying principally (as had the district court) upon the "savings clause" of Article XVIII of the Agreement. *Yankton Sioux Tribe v. Gaffey*, 99 F.3d 1439, 1447-48 (8th Cir. 1996). This Court granted certiorari and reversed. *Yankton Sioux Tribe*, 522 U.S. 329.[4]

The Court based its decision primarily on the plain language of the 1894 statute. In particular, the Court found that Articles I and II of the Agreement contained

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[4] The facts set forth in this paragraph appear in *Yankton Sioux Tribe*, 522 U.S. at 340-42.

" 'cession' and 'sum certain' language [which] is 'precisely suited' to terminating reservation status." 522 U.S. at 344. The Court cited *DeCoteau*, 420 U.S. at 445, as support for that conclusion and continued:

> The terms of the 1894 [Yankton] Act parallel the language that this Court found terminated the Lake Traverse Indian Reservation in *DeCoteau* . . . and, as in *DeCoteau* . . . the 1894 Act ratified a negotiated agreement supported by a majority of the Tribe.

522 U.S. at 344. The Court then rejected the holding of the lower courts that the Article XVIII savings clause should be given decisive effect and found that the clause was not "meaningfully distinct from the savings clauses that have failed to move this Court to find that pre-existing treaties remain in effect under comparable circumstances." *Id.* at 348.

Although earlier passages in the Court's opinion indicated that the Yankton Reservation was disestablished, the Court chose not to determine whether the reservation was "disestablished . . . altogether." *Id.* at 358. Observing that it "need not determine" that issue to decide the case before it, which involved only "ceded" lands, the Court elected to "limit [its] holding to the narrow question presented." *Id.* The Court did so after noting "conflicting understandings about the status of the reservation" and alluding to the Tribe's ownership of "land in common." *Id.* The Court therefore reversed and remanded the case to the lower courts for further action. *Id.*

C. The Second Round of Litigation.

1. On remand, the district court consolidated the Tribe's initial action with a new action brought by the Tribe to challenge state criminal jurisdiction over acts of tribal members on non-ceded land within the original reservation boundaries. The United States intervened as a party. The district court once again at App. 53, 68-69, 112, held that the original boundaries of the reservation remained intact notwithstanding this Court's statement in *Yankton Sioux Tribe*, 522 U.S. at 345, that the 1894 Act was "readily distinguishable from surplus land Acts that the Court has interpreted as maintaining reservation boundaries." Thus, held the district court, all lands within those original boundaries that were not ceded in the 1894 Act remain part of the reservation, including all of the lands allotted to individual Indians (at least 85 percent of which had been transferred to non-Indians). App. 112. The court, with minimal analysis, also held that the "agency lands" which had been ceded by the Tribe to the United States under Article VIII retained reservation status. App. 112.

Although the district court's lengthy opinion cannot be fully summarized here, a few points bear mention. The district court began with the premise that this Court had ruled that "the original exterior boundaries [of the reservation] remain." App. 68. The court mentioned Articles I and II of the Agreement a single time, noting in passing only that they ceded surplus lands to the United States and thereby diminished the reservation. App. 86. The court neither quoted nor analyzed this Court's statement that the "cession and sum certain" language of Articles I and II was " 'precisely suited' to terminating reservation

status." *Yankton Sioux Tribe*, 522 U.S. at 344. Not surprisingly, then, the court concluded that "[n]othing in the explicit language of the 1892 Agreement supports disestablishment of the Reservation." App. 86.

2. The Eighth Circuit affirmed in part and reversed in part. Reversing the district court, the Eighth Circuit held following *Yankton Sioux Tribe* that the boundaries of the 1858 reservation were, in fact, eliminated. App. 26, 47. In particular, the court agreed with the State that allotted land which had left Indian ownership was no longer part of the reservation or, indeed, "Indian country" of any kind. App. 47. However, the Eighth Circuit affirmed the district court's holding that the reservation had not been "disestablished," finding that the reservation presently consists of certain former "agency lands" later conveyed to the Tribe and, potentially, thousands of acres of "trust" land. App. 48.

In holding that the 1894 Act did not disestablish the Yankton Reservation, the Eighth Circuit began, necessarily, at attempting to distinguish *DeCoteau*, in which this Court held that an agreement which ceded all of the tribe's unallotted lands for a sum certain disestablished that reservation. *See* discussion at IIA *infra*. It then found that the Yankton Agreement's "cession and sum certain" language was immaterial because it explicitly referred only to the ceded lands. App. 30, 33-37. Having brushed past the very language and rationale that controlled *DeCoteau* and *Yankton Sioux Tribe*, the court was forced to rely mainly on the bare negotiating history for guidance. The court nonetheless did acknowledge that the 1894 Act "intended to diminish the reservation by not only the ceded land, but also by the land which it foresaw would

pass into the hands of the white settlers and homesteaders." App. 43.

The breadth of the Eighth Circuit's holding is somewhat muddy. The court stated that it "cannot define the precise limits of the reservation which remains," at least in part, because the "current amount of Indian trust land on the Yankton Sioux Reservation is unclear from the record." App. 47. The court observed that the term "trust land"

> is variously used to include 1) the land reserved to the federal government in the 1894 Act and later returned to the Yankton Tribe [the agency lands], 2) land allotted to individual Indians that remains held in trust, and 3) land taken into trust under the Indian Reorganization Act of 1934.

App. 48. The court held that the first category, the one thousand plus acres of agency lands, definitely "continues to be a reservation," App. 48 – even though those lands were ceded in the 1894 Act and therefore are squarely covered by this Court's decision in *Yankton Sioux Tribe*. The court then left it "to the district court on remand to make any necessary findings relative to the status of Indian lands which are held in trust." *Id.* It thus left to the district court to determine whether allotted trust lands and lands taken into trust under the Indian Reorganization Act of 1934 (IRA) have the "status" of parcels of a "reservation" under 18 U.S.C. § 1151(a).

Petitions for rehearing were filed by the State, Charles Mix County, the Waste District, and the Tribe, but all were denied. App. 114. Chief Judge Wollman and Judges Beam and Loken would have granted the State,

County, and Waste District petitions; the latter two judges would also have granted all of the petitions. App. 114.

REASONS FOR GRANTING CERTIORARI

I. THE DECISION OF THE EIGHTH CIRCUIT SQUARELY CONFLICTS WITH THE SUBSEQUENT DECISION OF THE UNANIMOUS SOUTH DAKOTA SUPREME COURT.

One day after the Eighth Circuit issued the decision below, the South Dakota Supreme Court issued its decision in *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999) (reprinted in the Appendix at 141-172), which unanimously held that the 1894 Act disestablished the Yankton Sioux Reservation. That holding directly conflicts with the Eighth Circuit's decision.

Bruguier arose from the state court conviction of James Bruguier for committing burglary in a town lying within the original boundaries of the Yankton Reservation. Specifically, the offense occurred on allotted land to which Indian title had been extinguished. App. 143. Bruguier filed a state habeas corpus petition which asserted that the reservation remained intact and that the state therefore lacked jurisdiction over the crime. *Id.* The habeas judge concluded that the reservation had been "disestablished" and denied the petition. *Id.* (By coincidence, on the same day the habeas judge signed her findings, the U.S. District Court ruled that the original reservation boundaries still existed. *Id.*). The South Dakota Supreme Court affirmed, concluding that the 1894 Act disestablished the reservation.

The South Dakota Supreme Court found that the statutory language, the historical context, and later developments in the area all strongly supported disestablishment. As to the former, the court stated that the cession and sum certain language of the Yankton Agreement "manifests an almost irrebuttable presumption of congressional intent" to disestablish. App. 157. This reading of the statutory language is supported, the court ruled, by late nineteenth century views of Indian ownership. At that time it was commonly understood that when tribal ownership was eliminated (for example, by allotting tribal land to individual Indians), a " 'critical component of reservation status' was lost." App. 161 (quoting *Yankton Sioux Tribe*, 522 U.S. at 346). The court went on to find that, "[a]lthough there are inconsistencies in this sphere also, we find little in the historical context or the Treaty negotiations to suggest that the reservation would continue." App. 164.

Following the lead of *Yankton Sioux Tribe*, the South Dakota Supreme Court also found a lack of a "jural distinction" between the 1890 Sisseton agreement at issue in *DeCoteau* and the 1892 Agreement at issue here. App. 169. The court noted the repeated references to the Sisseton Agreement during the Yankton negotiations and cited numerous similarities between the two situations: both Acts sold all unallotted lands; the Acts contained similar preamble language; opened lands on both reservations were subject to the federal homestead and townsite laws; in both instances the United States retained an agency and schools; and "[m]ost significantly no land in common was retained, no boundaries were redefined, and parcels allotted to Indians were in both instances

spread randomly across the former reservations." App. 169-170. Accordingly, the court concluded that the "intent behind" the language in the 1894 Yankton Act "is unmistakably the same" as that in the 1891 Act that disestablished the Lake Traverse Reservation. App. 170.[5]

Both the United States and the Tribe have accordingly acknowledged in this Court that the South Dakota Supreme Court found the Yankton reservation was "wholly disestablished" in *Bruguier*. "Application [of the United States] for Extension of Time Within Which to File a Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit," at 5 n.1 (Feb. 28, 2000); "Application [of the Yankton Sioux Tribe] for Extension of Time Within Which to File a Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit," at 4 n.1 (Mar. 3, 2000).

This Court has explained that "[a] principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991). The Court has frequently granted certiorari to resolve disputes concerning the status of reservations when United States courts of appeals and state

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[5] Prior to *Bruguier*, the South Dakota Supreme Court had several times indicated its view that the Yankton Reservation was disestablished. *See, e.g., State v. Winckler*, 260 N.W.2d 356, 360 (S.D. 1977) ("this court has ruled that the Yankton Reservation was disestablished"); *State v. Thompson*, 355 N.W.2d 349, 350-51 (S.D. 1984) (in which the court posed the question whether the Yankton reservation was "disestablished" and answered the question in the affirmative).

supreme courts were in conflict, one obvious example being in the first round of this case. *See Yankton Sioux Tribe*, 522 U.S. at 342 ("We granted certiorari to resolve a conflict between the decision of the Court of Appeals and a number of decisions of the South Dakota Supreme Court. . . . "); *see also Hagen v. Utah*, 510 U.S. 399, 409 (1994) ("We granted certiorari . . . to resolve the direct conflict between these decisions of the Tenth Circuit and the Utah Supreme Court. . . . "); *DeCoteau*, 420 U.S. at 430-31 ("We granted certiorari . . . to resolve the conflict between the Supreme Court of South Dakota and the Court of Appeals for the Eighth Circuit. . . . ").

II. THE DECISION OF THE EIGHTH CIRCUIT CONFLICTS WITH DECISIONS OF THIS COURT AND ESTABLISHED INDIAN LAW JURISPRUDENCE.

A. The Eighth Circuit's Decision Conflicts With *DeCoteau v. District County Court*, 420 U.S. 425 (1975), Which *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), Held to Be Squarely on Point.

This Court has already addressed the consequences of an agreement by a tribe to cede all of its unallotted reservation lands for a sum certain. In *DeCoteau*, 420 U.S. 425, this Court held that such an agreement disestablishes the reservation. As night follows day, the same result must obtain with respect to the Yankton Sioux Reservation, at least in the absence of very weighty evidence to the contrary. By holding otherwise, the Eighth Circuit failed to adhere to this Court's guiding precedent.

1. As described in *DeCoteau*, 420 U.S. at 431-44, the history of the Lake Traverse Reservation followed the same pattern as that of the Yankton Sioux Reservation. The Sisseton and Wahpeton bands of the Sioux Nation (like the Yankton Sioux) remained loyal to the United States when the Sioux Nation rebelled. This prompted the United States to enter into a treaty with the Sisseton-Wahpeton Tribe in 1867 which granted the Tribe a reservation in the Lake Traverse area. "But familiar forces soon began to work upon the Lake Traverse Reservation," *id.* at 431, forces which led to the Dawes Act and the allotment of more than 120,000 acres of the reservation. *Id.* at 438 n.19. In 1889, a series of negotiations took place that resulted in an agreement through which the Sisseton-Wahpeton Tribe agreed to cede for a sum certain all the unallotted lands within its reservation. *Id.* at 437. Additional allotments of over 110,000 acres were also provided for. *Id.* at 438 n.19. Two years later, Congress enacted a statute reciting and ratifying the agreement. Act of March 3, 1891, c. 543, 26 Stat. 1035. In *DeCoteau*, this Court held that " 'the face of the Act,' and its 'surrounding circumstances' and 'legislative history,' all point unmistakably to the conclusion that the Lake Traverse Reservation was terminated in 1891." *Id.* at 445.

In particular, the Court in *DeCoteau* pointed to the following factors as critical to its decision. First, "[t]he negotiations leading to the 1889 Agreement show plainly that the Indians were willing to convey to the Government, for a sum certain, all of their interest in all of their unallotted lands." *Id.* Second, "[t]he Agreement's language, adopted by majority vote of the tribe, was precisely suited to this purpose." *Id.* Third, that "language is

virtually indistinguishable from that used in other sum-certain cession agreements ratified by Congress in the same 1891 Act." *Id.* at 446. Fourth, the agreement was distinct from other agreements which the Court held had not changed reservation boundaries. *Id.* at 447-49. And fifth, "[u]ntil the Court of Appeals altered the status quo, South Dakota had exercised jurisdiction over the unallotted lands of the former reservation for some 80 years." *Id.* at 449.

2. Each of those factors is equally applicable to the Yankton Sioux Reservation. Most importantly, this Court recognized in *Yankton Sioux Tribe* that the terms of the 1894 Yankton Agreement "parallel the language that this Court found terminated the Lake Traverse Indian Reservation in *DeCoteau*. . . . " 522 U.S. at 445. In addition, as in *DeCoteau*, "all" the unallotted lands were ceded to the United States for a sum certain in the Yankton Agreement, App. 128-29; the language of the Yankton Agreement has been found to be " 'precisely suited' " to termination, and was adopted by a majority of the tribe, 522 U.S. at 344; the language is "virtually indistinguishable" from other cession and sum certain agreements identified in *DeCoteau*; the Yankton Agreement has been held to be "readily distinguishable" from agreements which preserved reservation boundaries, *id.* at 345; and South Dakota had no doubt exercised jurisdiction over the unallotted lands for more than 80 years. *Id.* at 357.[6]

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[6] There are, in fact, at least 18 points of identity between the two Agreements:

1. **Time period equivalent.** Sisseton-agreement approved 1891, 26 Stat. 1035 (1891); Yankton-1894, 28 Stat. 286 (1894).

The Eighth Circuit nonetheless held that *DeCoteau* did not control, citing two specific distinctions between

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2. **Allotment under General Allotment Act.** Sisseton, 26 Stat. 1035, 1036; Yankton, 28 Stat. 286, 314.

3. **Similar acreage allotted.** Sisseton-256,000 acres, 1995 Exhibit 610; Yankton-262,000 acres, 1995 Exhibit 610.

4. **Similar per capita acreage allotted.** Sisseton-168 acres per capita, 1995 Exhibit 610; Yankton-152 acres per capita, 1995 Exhibit 610.

5. **Interior instructions to Commissioners equivalent.** Sisseton, letter from Commissioner of Indian Affairs of August 13, 1889; Yankton, letter from Commissioner, J.T. Morgan, Department of Interior to Commissioners of July 27, 1892.

6. **Preambles equivalent.** Sisseton, 26 Stat. 1035, 1036; Yankton, 28 Stat. 286, 314.

7. **Cession language used in both.** Sisseton, 26 Stat. 1035, 1036; Yankton, 28 Stat. 286, 314.

8. **All unallotted lands ceded in both.** Sisseton, 26 Stat. 1035, 1036; Yankton, 28 Stat. 286, 314.

9. **Sum certain language used in both.** Sisseton, 26 Stat. 1035, 1036; Yankton, 28 Stat. 286, 315.

10. **Entry subject to homestead and townsite laws in both.** Sisseton, 26 Stat. 1035, 1036; Yankton, 28 Stat. 286, 319.

11. **Missionaries allowed to purchase lands in both.** Sisseton, 26 Stat. 1035, 1037; Yankton, 28 Stat. 286, 316.

12. **School lands granted in both.** Sisseton, 26 Stat. 1035, 1039; Yankton, 28 Stat. 286, 319.

13. **United States retained an agency and schools in both.** Sisseton, 26 Stat. 1035, 1037; *DeCoteau*, 420 U.S. at 435 n.16; *Id.* at 438 n.19; Yankton, 28 Stat. 286, 316; *Yankton*, 522 U.S. at 336.

14. **Allotments were throughout the former reservation in both.** Sisseton, *DeCoteau*, 420 U.S. at 428; Yankton, *Yankton*, 522 U.S. at 326.

the Sisseton-Wahpeton and Yankton Agreements, and stating generally that the "circumstances surrounding the negotiation[s]" and "the content and wording of the agreements" were very different. App. 23. The latter point flies directly in the face of this Court's statement in *Yankton Sioux Tribe*, 522 U.S. at 344, that Articles I and II of the two Agreements were virtually identical and that the "terms" of the agreements are "parallel." Insofar as we can tell, the only support the Eighth Circuit provides for its conclusion that the Agreements may be distinguishable is that the Sisseton-Wahpeton Agreement "negotiated allotments for each individual, including married women." App. 23. The court does not explain why this should be decisive of disestablishment, and the actual statistics show, in any event, that the *per capita* lands taken in allotted status at the Lake Traverse Reservation and at the Yankton Reservation were approximately the same: 168 acres and 152 acres, respectively.[7]

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15. **Presidential proclamation opening the reservation referred to "cession language" in both.** Sisseton, 27 Stat. 1017; Yankton, *Yankton*, 522 U.S. at 354.

16. **Presidential proclamation opening the reservation referred to "Schedule of lands within . . . the Reservation . . . " in both.** Sisseton, 27 Stat. 1017, 1018 (1892); Yankton, 29 Stat. 865, 866 (1895).

17. **State assumed virtually unquestioned jurisdiction in both.** Sisseton, *DeCoteau*, 420 U.S. at 442; Yankton, *Yankton*, 522 U.S. at 357.

18. **Two situations generally treated in parallel fashion on maps.** Sisseton and Yankton, Exhibit 620, JA 412 (1901); Exhibit 621, JA 413 (1910); Exhibit 44, JA 549 (1909).

[7] Sisseton tribal members took approximately 256,000 acres as allotments, *see DeCoteau*, 420 U.S. at 435 n.16, and Sisseton in

As to the negotiating history, the Eighth Circuit found that the "background" of the Sisseton-Wahpeton Agreement was "very different . . . because the tribal members there had expressed their clear desire to terminate their reservation." App. 23. Yet in support of this, the court appears to cite nothing more than a press report (quoted in *DeCoteau*, 420 U.S. at 432-33), in which Sisseton-Wahpeton tribal spokesmen are reported to have said that "[w]e never thought to keep this reservation for our lifetime." That is a very slender reed upon which to rest a fundamental distinction between the Agreements, particularly in light of the letter written by three Yankton chiefs and more than 100 members of the Yankton Tribe to the Congress stating that they

> "want[ed] the laws of the United States and the State that we live in to be recognized and observed," and that they did not view it as desirable to "keep up the tribal relation . . . as the tribal relation on this reservation is an obstacle and hindrance to the advancement of civilization."

Yankton, 522 U.S. at 353 (quoting S. Misc. Doc. No. 134, 53d Cong., 2d Sess., 1 (1894)). The State agrees, of course, with the Eighth Circuit "that similar treaty language does not *necessarily* have the same effect when dealing with separate agreements." App. 23 (emphasis added). But this argument surely lacks validity when this Court has tied two agreements as closely together as *Yankton Sioux Tribe*,

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1890 had 1,522 residents. Exhibit 610, JA 305. Yankton tribal members took approximately 262,000 acres in allotments, *see Yankton*, 522 U.S. at 336, and Yankton in 1890 had 1,725 residents. Exhibit 610, JA 305.

522 U.S. at 344, tied the Yankton and Sisseton Agreements. Moreover, no factual or legal distinction put forward by the Eighth Circuit or the parties below warrants the conclusion that the "parallel language" of the Sisseton-Wahpeton and Yankton Agreements should not be given the same effect.

B. The Eighth Circuit's Decision to Carve Out Three Categories of "Trust Land" as Reservation Land Contravenes This Court's Precise Holding in *Yankton*, Established Indian Law Jurisprudence, and Common Sense.

Having erroneously concluded that the 1892 Yankton Agreement contemplated continued "reservation" status of certain "trust lands," the Eighth Circuit went about determining what particular lands fit within that category. The court, as noted, came up with three types of trust lands that retained, or may have retained, reservation status. Upon closer inspection, however, it becomes apparent that case law, established jurisprudence and a common-sense reading of the Agreement dictate that none of those three types of "trust lands" possibly retained "reservation" status.

1. The first of the three categories of trust land described by the Eighth Circuit is the one thousand plus acres of agency land which had been "ceded" for payment to the United States under Article VIII of the Agreement, utilized by the United States for about thirty-five years, and then transferred to the Tribe at some point

after 1929.[8] The most obvious problem with the Eighth Circuit's holding that this land "continues to be a reservation" (App. 48) is that it contradicts the direct holding of *Yankton Sioux Tribe*. In that decision, this Court unequivocally held that "the unallotted lands ceded as a result of the 1894 Act did not retain reservation status." 522 U.S. at 342. Because the "agency land" had been "ceded" to the United States, as the opinion of the court of appeals acknowledges (App. 20), it falls within the precise holding of this Court. It comes as no surprise, then, that there is no mention of a mile square "reservation" in the 1894 Agreement or in the contemporaneous negotiations.

Even if the court of appeals could conceivably undermine this Court's precise holding, it failed to do so. In this regard, it is noted that Article VIII of the Agreement (on which the court of appeals relied) provided that the lands would be "reserved from sale to settlers until they are no longer required for [agency, schools and other purposes]." App. 132. The Act of February 13, 1929, 45 Stat. 1167, which implemented this provision, provided that the lands should be disposed of to the tribe, rather than to the settlers, but retained the requirement that

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[8] See also, text accompanying n.3, *supra*. After the Eighth Circuit's opinion, the County attempted to put before the Eighth Circuit evidence demonstrating that no *actual* transfer occurred until the 1950s, and that no trust status was conferred on the land until that time, and also attempted to put before the court the very minimal use of the lands. The Respondents here attempted to introduce other information they deemed relevant. The court of appeals denied the motion to add the evidence to the record but suggested that the information could be sought to be introduced on remand to the district court. App. 173.

disposal could occur only "when they are no longer required for agency, schools, or other purposes." According to the Solicitor, that day arrived by 1934. Ex. 627, JA 572.

Alaska v. Native Village of Venetie, 522 U.S. 520, 527 (1998) identifies two "requirements" which are "necessary" for the finding of "Indian country" generally:

> [The lands] must have been set aside by the Federal Government for the use of the Indians as Indian lands; second, they must be under federal superintendence.

Because the ceded agency lands could be transferred *only* when the government no longer intended to use them for any purpose, they could hardly be argued to thereafter be "set aside as Indian lands" and most definitely could not thereafter be argued to "be under federal superintendence."[9]

2. The Eighth Circuit next held that allotted lands which remain in trust – and are therefore "Indian country" under 18 U.S.C. § 1151(c) – might also be "reservation" land. There are a number of difficulties with that holding. First, it is established law that reservation land cannot lose its Indian country status by virtue of a transfer. *See Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Yet, as

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[9] This is further confirmed by S. Rep. No. 1130, 70th Cong., 1st Sess. (1928), Ex. 522, JA 723-24, in which the Department of Interior objects to the then pending bill: "It would be a step backward in that it would necessarily limit the jurisdiction of the Federal Government over the reserved area and bring about some undesirable conditions that could not be readily controlled."

even the Eighth Circuit acknowledged, land allotted to Yankton Tribe members which had been transferred to non-Indians *did lose* its "Indian country" status. App. 47. This means none of the "allotted lands" could have been within a "reservation" after the 1894 Act or they would *not* have lost their "Indian country" status by transfer. The Eighth Circuit nonetheless held they did lose "Indian country" status when they passed from Indian ownership. The decision below thus creates a clear doctrinal impossibility.

Second, the decision ignores the rationale that informed the *DeCoteau* Court – when "cession and sum certain" language is used, reservation status is terminated for all lands, at least when all of the unallotted lands are ceded so that the tribe retains no lands in common. *DeCoteau*, in discussion of other agreements, noted that the

> Indians [in the other agreements] sold only a described portion of their lands, rather than all "unallotted" portions, the result being merely a reduction in the size of the affected reservations.

420 U.S. at 439. In *DeCoteau*, in contrast, *all* of the unallotted lands were sold to the United States by the use of the weighty "cession and sum certain language," and the reservation was thus subject to "termination." 420 U.S. at 449. *DeCoteau* also points out that it might have been better to have "carved out a diminished reservation" rather than have ceded "all, rather than a major portion of the tribe's allotted lands." *Id.* at 446-47. That was not, however, accomplished, and, as this Court concluded, "we cannot remake history." *Id.* at 449. Nothing in *Yankton Sioux Tribe* detracts from this analysis. The court

below thus ignores the rationale underlying *DeCoteau* and *Yankton Sioux Tribe* when it finds that "allotted" lands remained in "reservation" status.

Finally, the finding of the court below that scattered and noncontiguous allotted land may also be "reservation" is inconsistent with the meaning and development of the term "Indian country." As codified in 18 U.S.C. § 1151, there are three categories of Indian country: (a) all lands within reservations, (b) dependent Indian communities, and (c) Indian allotments, "the Indian titles to which have not been extinguished." As this Court recently reconfirmed in *Native Village of Venetie*, 522 U.S. at 528-29, the § 1151(c) category is derived from *United States v. Pelican*, 232 U.S. 442, 449 (1914), in which the Court "held that Indian allotments – parcels of land created out of a diminished Indian reservation and held in trust by the Federal Government for the benefit of individual Indians – were Indian country." *See also DeCoteau*, 420 U.S. at 427 n.2, 446-47. The Court in *Native Village of Venetie*:

> Before § 1151 was enacted, we held in three cases that Indian lands that *were not reservations* could be Indian country and that the Federal Government could therefore exercise jurisdiction over them. *See . . . United States v. Pelican*, 232 U.S. 442 (1914).

522 U.S. at 528 (emphasis added). The present-day allotted lands fitting within the Eighth Circuit's second category of trust land are such § 1151(c) lands. The Eighth Circuit's decision undermines the well-defined categories set out in statute and case law. Moreover, it suggests that Congress deliberately determined that a "reservation"

which had existed should be transformed into one which consists of scattered and noncontiguous "allotted lands," and not all lands within specified boundaries. The court below cited no precedent for this novel historical and legal view.

3. Third, the Eighth Circuit held that lands acquired in trust by the United States since 1934 under the Indian Reorganization Act might attain "reservation" status. It is fanciful to believe, however, that the framers of the Yankton Agreement – who acted at a time when Congress was actively seeking to end the reservation system – anticipated that some forty years later Congress would enact a statute under which the United States would take former reservation land and place it in trust. It is equally fanciful to believe that framers of the 1894 Act intended that lands lost from allotted status would regain "reservation" status by virtue of the 1934 Act.

If we move from the Agreement directly to the scope and operation of the IRA, the Eighth Circuit's approach fares no better. The United States can deliberately create "reservations" from land taken in trust under IRA, but to do so it must follow procedures set forth in Section 7 of the statute, *codified* at 25 U.S.C. § 467. No showing has been, or could be, made that the United States invoked Section 7 with respect to any land within the boundaries of the original Yankton Reservation. Not only does the mere taking of land into trust not make it "reservation" land. The Eighth Circuit has held that taking land into trust does not even make such land "Indian country." *See United States v. Stands*, 105 F.3d 1565 (8th Cir. 1997), *cert. denied*, 522 U.S. 841 (1998); *but see United States v. Roberts*,

185 F.3d 1125 (10th Cir. 1999) (petition for writ of certiorari pending at Docket No. 99-1174).

III. THE ISSUES RAISED BY THIS CASE ARE IMPORTANT AND RECURRING.

The conflict between the Eighth Circuit and the South Dakota Supreme Court creates serious practical difficulties for all governmental agencies attempting to administer the disputed area and for all those who live in the area. This is so because the two courts differ as to the amount of Indian country within the boundary of the original reservation, and land's status as "Indian country" has profound jurisdictional consequences. Civil and criminal jurisdiction, regulatory authority, and authority with regard to taxation are all deeply impacted by the determination that land is "Indian country." *See* Wrend and Smith, *American Indian Law Deskbook*, at 36-37 (2d ed. 1998). In particular, a state loses much of its preexisting jurisdiction over civil causes of action arising in "Indian country." *See, e.g., Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (tribe lacks jurisdiction claim against nonmember in accidents occurring on state right-of-way); *Williams v. Lee*, 358 U.S. 217 (1959) (state lacks jurisdiction of claim of non-Indian against Indian for reservation transaction). Similarly, the state's ability to impose various taxes is deeply impacted by the existence of "Indian country." *See Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995); *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114 (1993). In addition, the courts have found that the state surrenders virtually all of its criminal jurisdiction

with regard to incidents involving Indians in "Indian country." *See American Indian Law Deskbook, supra,* 98-100.

The decision, moreover, seriously upsets the law of disestablishment in the Eighth Circuit and potentially beyond. The decision of the panel will be argued to create a rule that, when Congress and the tribe agree to diminish or disestablish an area, lands which the United States retains in agency or similar status will nonetheless retain "reservation" status. Importantly, lands which have "reservation status" cannot lose that status without further direct congressional authority. *See Solem,* 465 U.S. at 470.

In the case of South Dakota, this might be argued to mean that land retained for agency and school purposes within the former Sisseton "reservation" nonetheless retained "reservation" status. *See,* indicating the existence of such lands, *DeCoteau,* 420 U.S. at 435 n.16, 438 n.19; Ex. 571, JA 975-77 (1895 Sisseton Agency and buildings described); 39 Stat. 969 (1917) ("Sisseton Indian Agency buildings").

Similarly, the Act of April 23, 1904, 33 Stat. 254, which disestablished Gregory County, *see Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 603 (1977), contains Article V, § 2 which reserves lands for a subissue station, an Indian day school, and three missions. Article 1 of the Act of May 30, 1910, 36 Stat. 448, which disestablished Mellette County, *Rosebud,* 430 U.S. at 615, provides that the Secretary may reserve land for "agency, school and religious purposes." Bennett County has been held to be "sever[ed]" from the Pine Ridge Reservation by *United States ex rel. Cook v. Parkinson,* 525 F.2d 120, 122 (8th Cir.

1975), *cert. denied*, 430 U.S. 980 (1977). Nonetheless, Section 1 of the Act of May 27, 1910, 36 Stat. 440, provided that the Secretary could reserve such lands for "agency, school and religious purposes" for as long as needed; moreover, Section 3 of the Act provided that all "timber lands" were "reserved."

The retention of certain lands and areas by the United States for various purposes in diminishment and disestablishment situations was commonplace. Indeed it was clearly necessary because Indians needing assistance remained in the areas. There is no evidence, however, that the Congress intended the areas to have a "reservation" status despite the diminishment or disestablishment of the remainder of the area – indeed such has never even been argued, and no case has been cited in which such lands have been held to retain "reservation" status. The decision of the panel below, however, will invite litigation with regard to each of these parcels throughout South Dakota, and in every other state in which these commonplace provisions existed.

Finally, the suggestion of the panel that mere "trust" or "allotted" lands in diminished or disestablished reservation areas might retain or somehow have been revested with "reservation" status will likewise raise difficulties in every area subjected to disestablishment or diminishment. There are approximately 47,000,000 acres of allotted land and over 9 million acres of post-1934 trust land in thirty-six different states, and a significant (though unknown) amount of such land is surely beyond reservation boundaries. To place this land, or a significant portion of it, in battles to determine if it qualifies as "reservation" is surely unjustified by any precedent of

this Court and can only result in unproductive and devisive litigation.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDICES

Opinion of the United States Court of Appeals for the Eighth Circuit, Aug. 31, 1999 .....App. 1

Memorandum Opinion and Order of the United States District Court for the District of South Dakota, Southern Division, Aug. 14, 1998 ....App. 50

Order Denying Petition for Rehearing and for Rehearing En Banc of the United States Court of Appeals for the Eighth Circuit, Dec. 8, 1999 .....App. 114

Treaty with the Yankton Sioux, 1858 .....App. 115

Agreement with the Yankton Sioux or Dakota Indians, in South Dakota, 1894 .....App. 127

Opinion of the Supreme Court of the State of South Dakota in *Bruguier v. Class*, Sept. 1, 1999 .....App. 141

Order of the United States Court of Appeals for the Eighth Circuit, Dec. 9, 1999.....App. 173

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-3893

Yankton Sioux Tribe, and its individual members, Appellee, United States of America, on its own behalf and for the benefit of the Yankton Sioux Tribe, Intervenor Plaintiff – Appellee, v. Matt Gaffey, States Attorney of Charles Mix County; Herman Peters, Member of the Charles Mix, South Dakota, County Commission; Bruce Bakken, Member of the Charles Mix, South Dakota, County Commission; Jack Soulek, Member of the Charles Mix, South Dakota, County Commission, Appellants, William Janklow, Governor of South Dakota; Mark W. Barnett, Attorney General of South Dakota, Defendants.	*	Appeals from the United States District Court for the District of South Dakota.

Gary Beeson, Landowner; City of Dante; City of Geddes; City of Lake Andes; City of Pickstown; City of Platte; City of Ravinia; City of Wagner; Harvey P. Weisser, doing business as Weisser Oil Co., Inc., Individually,

Amici on Behalf of Appellant,

Vine Deloria, Jr.; Philip S. Deloria; Philip Lane, Sr.; Philip Lane, Jr.; James Weddell, descendants of Francois Deloria, Signatory to the Treaty of 1858, and descendants and relatives of Philip J. Deloria,

Amici on Behalf of Appellee.

No. 98-3894

Yankton Sioux Tribe, and its individual members,

Appellee,

United States of America, on its own behalf and for the benefit of the Yankton Sioux Tribe,

Intervenor Plaintiff – Appellee,

v.

Matt Gaffey, States Attorney of Charles Mix County; Herman Peters, Member of the Charles Mix, South Dakota, for County Commission; Bruce Bakken, Member of the Charles Mix, South Dakota, County Commission; Jack Soulek, Member of the Charles Mix, South Dakota, County Commission,

Defendants,

William Janklow, Governor of South Dakota; Mark W. Barnett, Attorney General of South Dakota,

Appellants.

Gary Beeson, Landowner; City of Dante; City of Geddes; City of Lake Andes; City of Pickstown; City of Platte; City of Ravinia; City of Wagner; Harvey P. Weisser, doing business as Weisser Oil Co., Inc., Individually,

Amici on Behalf of Appellant,

Vine Deloria, Jr.; Philip S. Deloria; Philip Lane, Sr.; Philip Lane, Jr.; James Weddell, descendants of Francois Deloria, Signatory to the Treaty of 1858, and descendants and relatives of Philip J. Deloria,

Amici on Behalf of Appellee.

No. 98-3896

Yankton Sioux Tribe, and its individual members; Darrell E. Drapeau, individually, a member of the Yankton Sioux Tribe,

Appellees,

v.

Southern Missouri Waste Management District, a non-profit corporation,

Defendant,

v.

State of South Dakota,

Third Party Defendant – Appellant.

Gary Beeson, Landowner; City of Dante; City of Geddes; City of Lake Andes; City of Pickstown; City of Platte; City of Ravinia; City of Wagner; Harvey P. Weisser, doing business as Weisser Oil Co., Inc., Individually,

Amici on Behalf of Appellant,

Vine Deloria, Jr.; Philip S. Deloria; Philip Lane, Sr.; Philip Lane, Jr.; James Weddell, descendants of Francois Deloria, Signatory to the Treaty of 1858, and descendants and relatives of Philip J. Deloria,

Amici on Behalf of Appellee.

No. 98-3900

Yankton Sioux Tribe, and its individual members; Darrell E. Drapeau, individually, a member of the Yankton Sioux Tribe,

Appellees,

v.

Southern Missouri Waste Management District, a non-profit corporation,

Appellant,

v.

State of South Dakota,

Third Party Defendant.

Gary Beeson, Landowner; City of Dante; City of Geddes; City of Lake Andes; City of Pickstown; City of Platte; City of Ravinia; City of Wagner; Harvey P. Weisser, doing business as Weisser Oil Co., Inc., Individually,

Amici on Behalf of Appellant,

Vine Deloria, Jr.; Philip S. Deloria; Philip Lane, Sr.; Philip Lane, Jr.; James Weddell,

descendants of Francois Deloria, Signatory to the Treaty of 1858, and descendants and relatives of Philip J. Deloria,

Amici on Behalf of Appellee.

Submitted: June 17, 1999
Filed: August 31, 1999

Before RICHARD S. ARNOLD, MAGILL, AND MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

Before the court are several appeals from judgments concerning lands once recognized to be part of the Yankton Sioux Reservation. After the Supreme Court decided in *South Dakota v. Yankton Sioux Tribe*, 118 S. Ct. 789 (1998) (*Yankton*), that the reservation had been diminished at the end of the nineteenth century when the Yankton Sioux Tribe (Tribe) ceded land to the United States, that case was remanded for further proceedings.[1] In the district court the case was then consolidated with an action

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[1] *See Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 141 F.3d 798 (8th Cir. 1998). Earlier in the history of the case we upheld the district court's previous ruling that the reservation had been neither disestablished nor diminished. *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 890 F. Supp. 878 (D.S.D. 1995), *aff'd*, 99 F.3d 1439 (8th Cir. 1996), *rev'd*, 118 S. Ct. 789 (1998).

brought by the Tribe to challenge state criminal jurisdiction over acts of tribal members on nonceded land within the original reservation boundaries. After an evidentiary hearing, the district court granted declaratory relief to the Tribe, its individual members, and its chairman Darrell Drapeau, and issued permanent injunctions enjoining state officials from exercising criminal jurisdiction over tribal members on "allotted or reserved lands." *Yankton Sioux Tribe v. Gaffey*, 14 F. Supp. 2d 1135, 1160 (D.S.D. 1998). The district court concluded that the reservation has not been disestablished and still includes all land within the original exterior reservation boundaries that was not ceded to the United States. *See id.* at 1159. The State of South Dakota (State), the Southern Missouri Waste Management District (District), and the individual named state and county officials appeal.[2]

We affirm the conclusion that the reservation was never clearly disestablished, but we reverse the conclusion that the original exterior boundaries of the reservation continue to have effect and that all nonceded lands remain part of the reservation. We also vacate the injunctions issued in the district court and remand the cases for further proceedings consistent with this opinion.

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[2] The named defendants in the declaratory judgment action were Matt Gaffey, States Attorney of Charles Mix County and four members of the Charles Mix, South Dakota, County Commission (collectively "county officials"), as well as William Janklow, Governor of South Dakota and Mark W. Barnett, Attorney General of South Dakota (collectively "state officials").

I.

The original boundaries of the Yankton Sioux Reservation were defined in a treaty between the United States and the Yankton Sioux Tribe on April 19, 1858, 11 Stat. 743 (1858 Treaty), to include approximately 400,000 acres in what is now Charles Mix County, South Dakota.[3] The Supreme Court held in *Yankton* that the reservation was diminished by land ceded to the United States under an 1892 agreement, later ratified by Congress in 1894. Act of Aug. 15, 1894, ch. 290, 28 Stat. 286, 314-19 (1894 Act). The specific question before the Court in *Yankton* was whether the Tribe continued to have jurisdiction over a portion of the ceded land on which the District planned to build a landfill. The Court focused its discussion on that issue, holding unanimously that the Yankton Sioux Reservation had been diminished by the 1894 Act, at least to the extent of the tracts ceded to the United States, and that the State has primary jurisdiction over all ceded lands including the waste site. *See Yankton*, 118 S. Ct. at 805.

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[3] The reservation was later surveyed and found to comprise 430,405 acres. *See Letter from the Commissioner of Indian Affairs to the Secretary of the Interior* (Dec. 9, 1983), *reprinted in*, S. Exec. Doc. No. 27, 53d Cong., 2d Sess., 1, 5 (1894) (1894 Commissioner Letter). It is estimated that under the Dawes Act, 167,325 acres were allotted and patented, and that an additional 95,000 acres were allotted after passage of the 1891 Act, leaving 168,000 acres of unallotted lands to be ceded through the 1894 Act. *See id.* The figures from the 1894 Commissioner Letter have been used by the parties throughout this litigation. Nevertheless, we note that the Court of Claims found in 1980 that the Yankton Sioux had ceded 201,110 unallotted acres through the 1894 Act. *Yankton Sioux Tribe v. United States*, 623 F.2d 159, 184 (Ct. Cl. 1980).

A.

The district court held an evidentiary hearing after *Yankton* was remanded and consolidated with the second case, and later ruled that the Yankton Sioux Reservation had not been disestablished and that it had only been diminished to the extent of the ceded lands. *Yankton Sioux Tribe v. Gaffey*, 14 F. Supp. 2d 1135 (D.S.D. 1998). The court noted that nothing in the explicit language of the 1892 agreement supports disestablishment, but that several articles support the conclusion that a diminished reservation remains intact. *Id.* at 1149-56. It also referred to the reports of the council meetings with the Tribe, which do not discuss boundary changes or relinquishment of the reservation, but indicate that the 1892 agreement "memorialized only the consent of the Tribe to sell the surplus lands." *Id.* at 1145. The efforts to have the tribal members live close to white settlers were not intended to eliminate the reservation, but to help the Indians adapt to changed conditions. *Id.* at 1146-47. The Indians could have concluded from the representations made by the government negotiators that they would retain independent powers of self government over their lands. *Id.* at 1147. The district court held that the Yankton Sioux Reservation consists of all nonceded land "within the original exterior 1858 treaty boundaries," including those parcels now owned by non Indians, as well as Indian owned land and the land reserved from sale in the 1892 agreement for agency, school, and other tribal purposes. *Id.* at 1159. It concluded that primary criminal and civil jurisdiction over these lands belongs to the Tribe and the United States. *Id.* The court then issued declaratory judgments and enjoined state and county officials from exercising criminal law

enforcement jurisdiction over tribal members alleged to have committed crimes on reservation land. *Id.* at 1159-60.

The State, the District, and the individual state and county officials appealed from these judgments in four separate appeals which have been consolidated by this court. A motion to expedite the appeals was also granted.[4] The four groups of appellants all present complementary arguments; they will be referred to collectively as "the State" when their arguments do not differ. The United States offers numerous arguments supportive of the Tribe's position; both appellees will be referred to collectively as "the Tribe" except where their arguments

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[4] Several other motions have been filed. The County has moved to have the briefs to the Supreme Court lodged with the clerk. The Supreme Court briefs were made part of the record in the district court and are available online. The motion is denied since the briefs are already available. The Tribe and the United States have moved to strike portions of the District's brief and to strike the amicus briefs of Gary Beeson and the Cities of Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia, and Wagner (collectively Cities). In addition, the Tribe has moved to strike the amicus brief of Harvey P. Weisser. All the motions to strike allege that the challenged briefs refer to documents which are not part of the record on appeal and thus violate Fed. R. App. P. 10(a). With the exception of the affidavits of Jonelle J. Drapeau and Ed Zylstra, submitted as addenda to the amicus brief of the Cities, the challenged references do not deal for the first time with key factual material about which the opposing parties were unaware. The motions to strike portions of the District's brief and portions of the Weisser and Beeson briefs are denied. The motions to strike the Cities' brief are granted only to the extent that they seek to strike the Drapeau and Zylstra affidavits; these affidavits are stricken and have not been considered.

diverge. Each side basically argues that it is entitled to win on all issues left open by the Supreme Court in *Yankton*. The contentions between them primarily involve questions of law which we review de novo, although any factual findings are reviewed for clear error. *See* Fed. R. Civ. P. 52(a).

The State asserts that the 1894 Act disestablished the Yankton Sioux Reservation and that the only remaining Indian country within the original boundaries are "Indian allotments, the Indian titles to which have not been extinguished." 18 U.S.C. § 1151(c). It claims that the Supreme Court held in *Yankton* that the reservation boundaries did not remain intact and that it also implied that *DeCoteau v. District County Court*, 420 U.S. 425 (1975) (finding the Lake Traverse Reservation completely disestablished), controls the outcome here. The State interprets the text of the 1894 Act and its legislative history as illustrating the parties' intent to eliminate the reservation, and it finds further support for this position in the subsequent treatment of the area. It argues that immediately following the 1894 Act the Tribe itself did not hold any land in common, and the State's exercise of jurisdiction over the area has led landowners to develop reasonable expectations that their lands are not Indian country.

The Tribe argues that the district court correctly ruled that all the nonceded land within the original exterior reservation boundaries constitutes the present Yankton Sioux Reservation.[5] The Supreme Court finding of diminishment in *Yankton* does not mean that the reservation

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[5] The district court observed that the Tribe's Constitution as amended in 1990 claimed jurisdiction "extending to the

boundaries did not continue as before, and it cites in support the Tenth Circuit's decision in *Ute Indian Tribe v. Utah*, 114 F.3d 1513 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 1034 (1998). The Tribe argues that *DeCoteau* does not control because each agreement and treaty with an Indian tribe is unique and must be examined in light of the circumstances surrounding its passage. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 119 S. Ct. 1187, 1203 (1999). It contends that the required clear statement of congressional intent to disestablish the reservation cannot be found in the text of the 1894 Act, the legislative history, or the historical circumstances surrounding its passage. It argues instead that these documents show that Congress and the parties who negotiated the agreement intended all the nonceded land to retain its reservation status.

B.

The *Yankton* Court explicitly limited the scope of its holding to the status of the ceded lands. Those "surplus" lands were intended by the 1892 agreement to be sold to white settlers, but a small amount of unallotted land was reserved from sale for use by the federal government. This land was returned to the Tribe in 1929 and remains under its control. *See* Act of February 13, 1929, ch. 183, 45 Stat. 1167. The Supreme Court refrained from going beyond what was necessary for it to decide in *Yankton*, and it did not determine issues of current jurisdiction

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original exterior 1858 boundaries." *Yankton Sioux Tribe v. Gaffey*, 14 F. Supp. 2d at 1157. *But see Yankton*, 118 S. Ct. at 804-05 (quoting the Constitution drafted in 1932 and amended in 1962).

over the nonceded lands which were reserved from sale or were originally allotted to individual tribal members. *See Yankton*, 118 S. Ct. at 805.

Allotment is a term of art in Indian law. It refers to the distribution to individual Indians of property rights to specific parcels of reservation. *See Affiliated Ute Citizens v. United States*, 406 U.S. 128, 142 (1972). The rights of use and occupancy to these lands were initially held in common by the Tribe, and the federal allotment policy sought to advance assimilation of the Indians by promoting its prevailing concept of individual land ownership. The practice of allotting reservation land began with the 1887 passage of the General Allotment Act (Dawes Act), ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. § 331). Under the Dawes Act individual tribal members received patents for allotments of reservation land in parcels of up to 160 acres, to be held in trust by the federal government for twenty five years. At the end of the trust period the United States would convey the allotment in fee to the individual allottee, who would then be subject to the civil and criminal laws of the State or Territory in which he resided. *Id.* at 389-90. At the time there was increasing pressure for western land for white settlers, and the Dawes Act provided that the Secretary of the Interior could negotiate with an Indian tribe to purchase all unallotted lands. *Id.* The act was thus a two pronged effort to open up lands for white settlement and to encourage assimilation of the Indians. It was considered a critical element in assimilation because the Indian concept of tribal control over land was fundamentally

different from the European American concept of individual land ownership. *See* Felix Cohen, *Handbook of Federal Indian Law* 131-32 (1982 ed.).

Approximately three-fifths of the Yankton Sioux Reservation was allotted under the Dawes Act and an act of February 28, 1891, ch. 383, 26 Stat. 794 (amending and extending the Dawes Act). Although the trust period was initially set at twenty five years, it was terminated early for some allotments and extended for others. At least eighty five percent of the land allotted on the Yankton Sioux Reservation eventually passed out of trust status; most of this land was sold in fee to non Indians. The allotment policy was later repudiated by the passage of the Indian Reorganization Act in 1934, which prohibited further allotment of reservation land and indefinitely extended the trust period for the remaining trust lands. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-77). The record is far from crystal clear about the specific lands remaining in trust on the Yankton Sioux Reservation, but it appears such land is interspersed in a checkerboard pattern with ceded lands and lands which have passed out of trust status and are now owned in fee.

The land ceded to the United States under the 1894 Act was subsequently sold to homesteaders, but the lands allotted to individual Indians continued to be held by the United States in trust for them. Many of these parcels soon lost their trust status. The Burke Act, ch. 2348, 34 Stat. 182 (1906) (codified at 25 U.S.C. § 349), permitted the government to take certain allotted lands out of trust status before the twenty five year time period expired and to grant the individual Indian allottees unrestricted

fee title to the land. In addition, the trust period on lands which had been allotted within a few years of the passage of the Dawes Act in 1887 began to expire in the first part of the twentieth century. At that time it was understood that when an allotment passed out of trust status and the allottee received the land in fee, he also became subject to the civil and criminal laws of the State, *see* Dawes Act, 24 Stat. at 389-90, and could then sell his land to non Indians if he chose.

As federal policy began shifting away from allotment, the federal government acted to protect the trust status of the remaining allotments which had not yet lost that status. In 1916, an executive order was issued extending the trust period on all but approximately 150 of the parcels still held in trust on the Yankton Sioux Reservation. Exec. Order No. 2363, Apr. 20, 1916. The trust period for these allotments was extended again in 1926 and 1929, Exec. Order No. 4406, Mar. 30, 1926; Exec. Order No. 5173, Aug. 9. 1929, and then indefinitely in 1934 by the Indian Reorganization Act, § 2, ch. 576, 48 Stat. 984, 984 (1934) (codified at 25 U.S.C. § 462). As a result of this history, the majority of residents in many areas of the original Yankton Sioux Reservation are non Indian.[6] *See* U.S. Dept. of Commerce, Census Bureau,

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[6] According to the 1990 Census, the overall area was approximately two-thirds non Indian, and although the tribal presence in the area has been increasing since the Fort Randall Casino was built, *see Yankton*, 118 S. Ct. at 804, it appears that non Indians own the bulk of the land within the original reservation boundaries. Municipalities such as Lake Andes and Wagner, for example, have non Indian majorities even though they are partially located on lands originally allotted to

1990 Census of Population, General Population Characteristics, South Dakota 29 tbl. 13 (1990 Census).

These appeals concern the undetermined current status of the 262,000 acres originally allotted to tribal members, some of which remain in trust, but the bulk of which have lost their trust status and are owned in fee by non Indians. The Supreme Court explained in *Yankton* that "[t]he conflicting understandings about the status of the reservation, together with the fact that the Tribe continues to own land in common, caution us . . . to limit our holding to the narrow question presented: whether unallotted, ceded lands were severed from the reservation." *Id.* It answered that question by holding that the ceded lands were severed and the reservation diminished to that extent. *Id.* We are called on now to address questions intentionally left open in *Yankton* – whether the Yankton Sioux Reservation was disestablished, and if not, whether the reservation has been diminished beyond the nonceded lands.

C.

Although the terms "diminished" and "disestablished" have at times been used interchangeably, disestablishment generally refers to the relatively rare elimination of a reservation while diminishment commonly refers to the reduction in size of a reservation. *Compare DeCoteau*, 420 U.S. 425; *with Rosebud Sioux Tribe v.*

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individual Yankton tribal members. The Tribe has apparently recently purchased additional land in the area and has petitioned the United States to take it into trust.

Kneip, 430 U.S. 584 (1977); *see also Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 99 F.3d 1439, 1443 n.4 (8th Cir. 1996). A finding of diminishment generally suggests that a discrete, easily identifiable parcel of land has been removed from reservation status. *See, e.g., Rosebud Sioux Tribe*, 430 U.S. at 615. The 168,000 acres by which the reservation was found diminished in *Yankton* are not contiguous, however, and no single boundary line can encompass these lands.

The question here is one of jurisdiction, that is to what extent the Tribe retains jurisdiction over any nonceded land within the original reservation boundaries. Congress clarified tribal jurisdiction by statute in 1948. For the Tribe to have jurisdiction over any land under the current statute it must qualify as Indian country pursuant to 18 U.S.C. § 1151. The statute defines Indian country to include all reservation land (§ 1151(a)), dependent Indian communities (§ 1151(b)), and allotments "the Indian titles to which have not been extinguished" (§ 1151(c)). If a reservation exists, the Tribe maintains jurisdiction over all land within its limits, § 1151(a),[7] but if there is no reservation, the State has primary jurisdiction over all land except allotments which continue to be held in trust,

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[7] It is undisputed that there are broad areas over which the Tribe cannot have exclusive jurisdiction regardless of territorial jurisdiction. For example, tribes do not have criminal jurisdiction over non Indians, *see Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978), or authority to regulate activities of nonmembers which do not affect tribal welfare and self-government unless the nonmembers have entered into consensual relations with the Tribe, *see Montana v. United States*, 450 U.S. 544, 563-67 (1981).

§ 1151(c); *see also, Alaska v. Native Village of Venetie*, 118 S. Ct. 948, 953 (1998).

The parties agree that the Tribe has jurisdiction over allotted lands still held in trust by the federal government. The State, the District, and the individual state and county officials assert, however, that this jurisdiction falls under § 1151(c) and that no other lands within the original 1858 boundaries have retained their status as Indian country under § 1151(a) because the reservation has been completely disestablished. The Tribe and the United States argue that the district court correctly ruled that the original exterior reservation boundaries retain effect and that all nonceded land within those boundaries constitutes the Yankton Sioux Reservation.

II.

A.

The heart of the matter involves whether Congress intended to disestablish the Yankton Sioux Reservation when on August 15, 1894 it finally ratified the 1892 agreement ceding certain tribal lands to the United States, *see* 28 Stat. at 314-20, or if not, whether it intended to diminish the reservation beyond the ceded lands. The 1892 agreement was the product of protracted negotiations between twenty four tribal representatives and the members of the Yankton Indian Commission (the Commissioners) who were appointed to procure the sale of the unallotted lands. The negotiations took place through a series of councils held from October through December of

1892. Although the immediate objective of the negotiations was the purchase of the unallotted lands, the Commissioners viewed this purchase as a step in the larger process of encouraging complete assimilation.

Commissioner Cole outlined the Commission's mission to the tribal representatives at the first council meeting. He explained that "The Great White father has sent us here to treat with you. He wants to give you a chance to sell your surplus lands. . . . He does not want you to sell your homes that he has allotted to you. He wants you to keep your homes forever." Council of the Yankton Indians (Oct. 8, 1892), transcribed in S. Exec. Doc. 27, 53d Cong., 2d Sess., at 49. Later in the negotiations, Commissioner Cole also encouraged the Tribe to adapt to western influences. He argued that the Tribe had no choice but to sell the unallotted lands, declaring: "The tide of civilization is as resistless as the tide of the ocean, and you have no choice but to accept it and live according to its methods or be destroyed by it. To accept it requires the sale of these surplus lands and the opening of this reservation to white settlement." Council of the Yankton Indians (Dec. 17, 1892), transcribed in S. Exec. Doc. No. 27, at 81.

The Tribe proved reluctant to accept the offer to purchase its surplus lands. The Commission's reports show its work was made difficult by the Indians' distrust of the federal government and by factional divisions within the Tribe. *See* Report of the Yankton Indian Commission (March 31, 1893), reprinted in S. Exec. Doc. No. 27, at 7-25 (hereinafter Report). Some tribal members favored the sale and focused their energies on obtaining the highest possible price for the land, while others

expressed strong opposition to any sale of tribal lands. *See id.* at 8-11. Key issues in the negotiations included the price to be paid for the lands, the payment of money due to individual Indians who had served as scouts for the United States, the continued payment of annuities pursuant to the 1858 Treaty, and the exclusion of alcohol from the ceded area. *See id.* at 12-21. As the Commission reported: "Careful inquiry into the conditions and requirements of these Indians soon revealed to us the fact that the purchase of the surplus land was but a small part of our mission and of minor importance to both the Indians and the Government, the provisions connected therewith for the future welfare of the Indians being of greater importance to them and to the Government than the sale of their surplus lands." *Id.* at 17.

In December of 1892, the Commission finally reached an agreement with the Tribe whereby it agreed in Articles I and II to "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation" for $600,000. 28 Stat. at 314-15. Article VIII provided that the portions of the ceded land currently occupied by the United States for "agency, schools, and other purposes" would be reserved from sale to settlers. 28 Stat. at 316. Article XVIII stated that the agreement did not abrogate the Tribe's rights under the 1858 treaty, 28 Stat. at 318, but this language pertained only to the right to receive annuities, not to the reservation boundaries. *See Yankton*, 118 S. Ct. at 799. Several other sections of the

agreement are relevant to these appeals, but many are not.[8]

By 1893 the Commissioners had collected the signatures required to show endorsement of the agreement by a majority of the adult male members of the Tribe. Congressional action to ratify the agreement was delayed, however, by the need to investigate allegations of fraud in the procurement of signatures. Congress finally ratified the agreement on August 15, 1894, along with two other similar surplus land sale agreements. 28 Stat. at 314-20. The 1894 Act incorporated the entire 1892 agreement, appropriated necessary funds, prescribed a punishment for violating the liquor prohibition, and reserved some sections for common school purposes. *Id.*

B.

Our starting point in analyzing the 1894 Act is the Supreme Court's *Yankton* decision, which each side not

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[8] Articles VII, IX-XVI, and XIX-XX have little bearing on the issues here. Article VII provided for gifts of gold pieces to tribal members. 28 Stat. at 316. Article IX allowed uncultivated allotted land to be leased. *Id.* Article X allowed religious societies to purchase ceded land on which they were operating. *Id.* at 316-17. Article XII provided that the money paid under the agreement was not subject to claims by creditors. *Id.* at 317. Article XIII fixed the status of mixed bloods. *Id.* Article XIV required the government to complete the allotment process as soon as possible. *Id.* Article XV settled the claims of the Yankton scouts who had not been paid for their services. *Id.* Article XVI settled the Tribe's claim to the Pipestone Reservation. *Id.* at 317-18. Article XIX required a copy of the agreement to be placed in the Yankton "Agreement Book." *Id.* Article XX bound the parties upon ratification by Congress. *Id.*

surprisingly interprets in its own favor. The State asserts that *Yankton* provides an easy answer to the questions before the court because it shows that the reservation status of all land within the original boundaries has been lost. Because the Court relied on *DeCoteau*, 420 U.S. 425, for the proposition that certain language in the 1894 Act was precisely suited to terminating reservation status, and because *DeCoteau* had found the Lake Traverse Reservation completely disestablished, it necessarily follows that the 1894 Act similarly completely disestablished the Yankton Sioux Reservation. In contrast, the Tribe distinguishes *DeCoteau* and claims that *Yankton*'s holding of diminishment does not mean the reservation has been disestablished or its exterior boundaries changed.

Justice O'Connor, writing for the unanimous *Yankton* Court, articulated its precise holding as follows:

> In sum, we hold that Congress diminished the Yankton Sioux Reservation in the 1894 Act, that the unallotted tracts [which were ceded to the United States through that Act] no longer constitute Indian country, and thus that the State has primary jurisdiction over the waste site and other lands ceded under the Act.

Yankton, 118 S. Ct. at 805. The Court explicitly declined to decide whether or not the 1894 Act altered the status of the nonceded lands. As Justice O'Connor explained, "[w]e need not determine whether Congress disestablished the reservation altogether in order to resolve this case, and accordingly decline to do so." *Id.* Whether or not other land within the original reservation boundaries retained its reservation status thus remained an open question.

Although the Court used *DeCoteau* in reaching its conclusion of diminishment, the *Yankton* holding was explicitly more limited than that in the earlier case. In *DeCoteau*, the Supreme Court analyzed the circumstances surrounding the ratification and the text of an agreement ceding certain lands on the Lake Traverse Reservation to the United States and held that the reservation there had been completely disestablished. *DeCoteau*, 420 U.S. at 427. The background of the Lake Traverse agreement was very different from that of the 1894 Act, however, because the tribal members there had expressed their clear desire to terminate their reservation. *See DeCoteau*, 420 U.S. at 432. In exchange they negotiated allotments for each individual, including married women. *See Act of March 3, 1891*, ch. 543, 26 Stat. 989, 1037-38. The circumstances surrounding the negotiation of the 1892 agreement with the Yankton Sioux and the difficulty in obtaining tribal votes to ratify it are significantly different, and there was no expression by the Indians of an intent to eliminate their reservation. Even more important, the content and wording of the agreements are very different, aside from the particular cession language the Supreme Court compared in *Yankton*. *Compare* 26 Stat. 1036-38, *with* 28 Stat. 314-18.

It is well established that similar treaty language does not necessarily have the same effect when dealing with separate agreements. Justice O'Connor writing for the Court in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 119 S. Ct. 1187, 1203 (1999), warned against reaching this conclusion.

> The . . . argument that similar language in two Treaties involving different partes [sic] has precisely the same meaning reveals a fundamental

> misunderstanding of basic principles of treaty construction. . . . Th[e] review of history and the negotiations of the agreement is central to the interpretation of treaties.

Context has been found to play a similarly important role in interpreting the language of the surplus land acts.[9] *See Solem v. Bartlett*, 465 U.S. 463, 469 (1984). The Commissioners negotiating on behalf of the United States told the Yankton tribal representatives that "[The Great White Father] wants you to keep your homes forever. He only wants you to sell your surplus lands for which you have no use." Council of the Yankton Indians (Oct. 8, 1892), transcribed in S. Exec. Doc. 27, 53d Cong., 2d Sess., at 49. In light of the significant contextual differences, we cannot assume that the Court's citation to *DeCoteau* means that that case controls the issues raised here.

The *Yankton* Court did make a number of explicit references to the status of the reservation boundaries. The Court found the 1894 Act distinguishable from those acts which it "has interpreted as maintaining reservation boundaries." *Yankton*, 118 S. Ct. at 799. The question before it was described as whether the 1894 Act "diminished the boundaries" of the reservation. *Id.* at 793. The

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[9] Although in 1871, Congress terminated treaty making with Indian tribes, the United States continued to negotiate agreements with them in much the same manner as it had negotiated treaties. *See* Felix S. Cohen, *Handbook of Federal Indian Law* 127-28 (1982 ed.). The 1892 agreement itself was also sometimes referred to as a "treaty." *See, e.g.*, S. Exec. Doc. No. 27, 53rd Cong., 2d Sess. at 48 (statement of Commissioner Cole to tribal negotiations); 1894 Commissioner Letter at 5 (letter from Commissioner of Indian Affairs referred to the Secretary of the Interior).

Court distinguished situations in which states acquired primary jurisdiction over opened lands and "thereby diminished the reservation boundaries" from those in which the entire opened area remained Indian country even though non Indians were able to purchase land. *Id.* at 797-98 (citations omitted). In the Commission reports it found evidence that the 1894 Act involved alteration of "the reservation's character" and "a reconception of the reservation." *Id.* at 802. Some of the language was "reminiscent" of that used for the diminished Unitah reservation. *Id.* ("Congress would 'pull up the nails' holding down the outside boundary" of the reservation) (citation omitted). The Court went on to hold that the savings clause of Article XVIII "pertains to the continuance of annuities, *not the 1858 borders.*" *Id.* at 800 (emphasis added). These references indicate the Court's understanding that the 1858 reservation boundaries did not remain intact following passage of the 1894 Act.

The Tribe is able to identify only one reservation which apparently continues to have its original boundaries even though some of the land within the boundaries has lost its reservation status – the Unitah Valley Reservation. The peculiar procedural history of the litigation involving that reservation does not suggest that it is precedent for maintenance of the original exterior borders of the Yankton Sioux Reservation. Long after the Tenth Circuit held that the Unitah Valley Reservation had been neither disestablished nor diminished, *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc), the Supreme Court decided in a different case that the reservation had been diminished, *Hagen v. Utah*, 510 U.S. 399 (1994). The Tenth Circuit then modified its *Ute* decision to

the extent it was in direct conflict with *Hagen*, holding that the ceded lands did not retain reservation status, but it did not change its position regarding the status of the other lands within the original reservation boundaries. *Ute Indian Tribe v. Utah*, 114 F.3d 1513, 1520 (10th Cir. 1997). The Tenth Circuit indicated that the reason it went no further in its 1997 decision was because of concern for finality in light of years of reliance on its earlier holding. *See id.* at 1524, 1527.

Based on our interpretation of what the Court said in *Yankton*, the lack of controlling precedent to suggest the original reservation boundaries can be maintained despite the extent of the diminishment, and the record before the court which we discuss below, we conclude that the original exterior boundaries of the Yankton Sioux Reservation do not serve to separate Indian country from areas under primary State jurisdiction.

C.

Congressional intent is the touchstone for analyzing whether the 1894 Act altered the status of the nonceded lands. *See Rosebud Sioux Tribe*, 430 U.S. at 586. After land is set aside for an Indian reservation, it retains that status until Congress explicitly indicates otherwise. *See Solem*, 465 U.S. at 470. Intent to diminish or disestablish a reservation must be "clear and plain." *United States v. Dion*, 476 U.S. 734, 738 (1986). Such intent must be "expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz v. Arnett*, 412 U.S. 481, 505 (1973). Whether Congress intended to

disestablish the reservation completely, or whether it intended all or some of the nonceded land to retain its reservation status is complicated by the fact that modern distinctions between different categories of Indian country were not recognized by nineteenth century legislators who had a different understanding of the requirements for land to be classified as reservation land and/or Indian country.

As mentioned earlier, three different categories of land currently qualify as Indian country:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151. This definition of Indian country was codified in 1948, and its key provisions have remained unchanged since that time. The State places great emphasis on the distinction this definition makes between land that is Indian country because it is part of a reservation, § 1151(a), and land which qualifies as Indian country under § 1151(c) because of its allotment status. An Indian allotment may be either a parcel held in trust by the federal government for the benefit of an Indian (a trust allotment) or a parcel owned by an Indian subject to a restriction on alienation in favor of the United States (a

restricted allotment). *See United States v. Stands*, 105 F.3d 1565, 1571-72 (8th Cir. 1997). Under § 1151(c) both types of allotments are Indian country regardless of whether they are on or off an Indian reservation. 18 U.S.C. § 1151(c); *see also Alaska v. Native Village of Venetie*, 118 S. Ct. 948, 953 (1998). In contrast, lands that are owned in fee without such restrictions on alienation do not qualify as Indian country under § 1151(c); but they may be classified as Indian country under § 1151(a) if they are within the boundaries of an Indian reservation. *See Stands*, 105 F.3d at 1572.

The parties all agree that lands originally allotted to individual tribal members that are still held in trust by the United States are Indian country within the meaning of § 1151(c), but they dispute whether the Yankton Sioux reservation still exists and whether any nonceded lands fit the current understanding of Indian country in § 1151(a). The State argues that although Congress intended some lands to retain their status as Indian country because of their status as allotments, it did not intend to maintain any reservation. The Tribe, on the other hand argues that the 1894 Act only altered the status of the ceded lands and that the reservation status of all other lands within the original 1858 boundaries was not changed.

Members of Congress in 1894 operated on a set of assumptions which are in tension with the modern definitions of Indian country, and the intentions of that Congress and of the 1892 negotiating parties are what we must look to here. At the turn of the century, Indian lands were defined to include "only those lands in which the Indians held some form of property interest: trust lands;

individual allotments, and, to a more limited degree, opened lands that had not yet been claimed by non-Indians." *Solem*, 465 U.S. at 468. Lands to which the Indians did not have any property rights were never considered Indian country. The notion of a reservation as a piece of land, all of which is Indian country regardless of who owns it, would have thus been quite foreign. Congress in the late nineteenth century was operating on the assumption that reservations would soon cease to exist, *see id*, and on the belief that allotting lands, and purchasing those left unallotted, were steps in the process of eventually dismantling the reservation system. *See United States v. Southern Pacific Transp. Co.*, 543 F.2d 676, 695 (9th Cir. 1976). The 1894 Congress would have felt little pressure to specify how far a given act went toward diminishing a reservation and would have had no reason to distinguish between reservation land and other types of Indian country. *See id.*

With this background in mind, *see Yankton*, 118 S. Ct. at 798, we consider whether the 1894 Congress intended to eliminate the Yankton reservation entirely or whether it intended to maintain the reservation status of some or all of the nonceded land. We apply the standard rules of interpretation for surplus land act cases. Each act must be analyzed individually, its effect depending on the language used and the circumstances of its passage. *See Solem*, 465 U.S. at 469. The statutory language provides the most probative evidence of congressional intent. *See Rosebud Sioux Tribe*, 430 U.S. at 586. Also relevant are the legislative history of the act and its historical context, including events surrounding the statute's passage which shed light on the contemporaneous understanding of it.

See Hagen v. Utah, 510 U.S. 399, 411 (1994). Treaties with Indians are also interpreted to give effect to the terms as the Indians themselves would have understood them. *See Mille Lacs Band of Chippewa Indians*, 119 S. Ct. at 1200. To a lesser extent, the subsequent treatment of the area is also relevant. *See Yankton*, 118 S. Ct. at 798. Under certain circumstances the "justifiable expectations" of the parties are considered, *see Rosebud Sioux Tribe*, 430 U.S. at 605, as well as changes in the demographics of the area, *see Hagen*, 510 U.S. at 411 All ambiguities are resolved in favor of the Indians, and neither diminishment nor disestablishment will be found lightly. *See Yankton*, 118 S. Ct. at 798; *Hagen*, 510 U.S. at 411.

The primary purpose of the 1892 agreement, which was ratified by the 1894 Act, was to cede the unallotted surplus lands on the Yankton Sioux Reservation to the United States. The specific language accomplishing this goal is found in Articles I and II of the agreement. Article I states that the Tribe agrees to "cede, sell, relinquish, and convey to the United States all their [sic] claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation." 28 Stat. at 314. Article II provides that the United States agrees to pay the Tribe $600,000 "in consideration for the lands ceded, sold, relinquished, and conveyed to the United States." *Id.* at 315. The text of these articles refers explicitly only to the ceded lands.

The State argues that the cession of these lands necessarily terminated the reservation status of all lands within the original 1858 boundaries. It contends that allotments were intended to be temporary in nature and

cannot alone constitute a reservation. It believes the failure of the Tribe to retain ownership in common of land for itself means that the reservation was disestablished. The State asserts that uncertainty about whether the Tribe owned land in common in 1894 was the key point which kept the *Yankton* Court from finding the reservation disestablished. Now that it has produced evidence to resolve that question in its favor and the district court has found that the Tribe did not reserve any lands in 1892 to be held in common, *see Yankton Sioux Tribe v. Gaffey*, 14 F. Supp. 2d at 1154, the reservation must be found disestablished. We cannot agree that the Supreme Court expected this point alone to be dispositive, however, for it said that among the factors causing it to limit its holding was "the fact that the Tribe *continues* to own land in common." *Yankton*, 118 S. Ct. at 805 (emphasis added), an apparent reference to the Tribe's current landholdings.

The State also relies heavily on what it views as the background understanding of the 1894 Congress to support its conclusion that cession of all land held in common by the Tribe necessarily terminated the reservation status of everything within the original 1858 boundaries. It cites the comment in *Yankton* that around the turn of the century " '[t]he notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar.' " *Id.* at 798 (quoting *Solem*, 465 U.S. at 468). It is important to keep in mind that it is not clear that the reference in *Solem* to "tribal ownership" meant ownership of land in common by the Tribe, as opposed to

ownership by a tribal member.[10] In any event Indian tribes did not hold ownership rights to land, but rather rights to exclusive use and occupancy of land. *See Spalding v. Chandler*, 160 U.S. 394, 403 (1896). Although the background understanding of the 1894 Congress "informs our inquiry," *id.*, courts have not been willing to extrapolate from general legislative assumptions and expectations of the late nineteenth century to find in each surplus land act a specific congressional purpose to remove all lands not under Indian control from reservation status. *See Solem*, 465 U.S. at 468-69. If Congress' general understanding that tribal ownership was a necessary component of reservation status controlled, all land which passed out of tribal ownership would necessarily be found to have lost its reservation status – a conclusion the Supreme Court has explicitly refused to adopt. *Id.*

More persuasive arguments regarding the interpretation of Articles I and II are drawn from evidence which

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[10] A careful reading of the relevant passage in *Solem* suggests that the Court used the terms "reservation lands" and "Indian lands" interchangeably to refer to all lands in which Indians had a property interest when it was discussing the assumptions of Congress in the early nineteenth century. *Solem* contrasted lands that "retained reservation status" from those that were "divested of all Indian interests," and the Court appeared to use both the words "reservation lands" and "Indian lands" to refer to lands that retained their reservation status. *Solem*, 465 U.S. at 468. "Indian lands" included: "[o]nly those lands in which the Indians held some form of property interest: trust lands, individual allotments, and, to a more limited degree, opened lands that had not yet been claimed by non-Indians." *Id.* Finally, the Court specifically pointed out that "only in 1948 did Congress uncouple reservation status from *Indian ownership*." *Id.* (emphasis added).

places the Act in its full historical context and sheds light on the parties' contemporaneous understanding of the impact of the cession. The State argues that this evidence shows that the " 'cession' and 'sum certain' language" in Articles I and II, *see Yankton*, 118 S. Ct. at 798 (citation omitted), was intended to terminate the reservation status of all lands within the original reservation boundaries. The Tribe argues that these same documents establish that the parties understood that these articles would only terminate the reservation status of the ceded lands.

The Commissioners who negotiated the agreement on behalf of the United States retained detailed records of the councils held to negotiate the sale of the unallotted lands and prepared an extensive report which was submitted to Congress along with the agreement. *See* S. Exec. Doc. No. 27, 53d Cong., 2d Sess. (1894). Two key points can be discerned from these records. First, the Commissioners indicated to the tribal representatives that their primary objective was the purchase of the *unallotted* lands. Second, the Commissioners emphasized to the tribal representatives that tribal members needed to move into the modern, post tribal era and that the sale of the unallotted lands would constitute one step toward that ultimate goal. *See id.*

The Commissioners repeatedly emphasized that they had one primary purpose. Commissioner Adams, for example, introduced the Commission's purpose, stating that "we . . . understand that you own, outside your allotments, a large quantity of land in common. It is this land that you own in common that we were appointed by the Great Father to talk to you about." Council of the

Yankton Indians (Oct. 8, 1892), transcribed in S. Exec. Doc. 27, 53d Cong., 2d Sess , at 48. They also indicated that the tribal leadership would retain some governing powers, suggesting for example, that: "It might be, after you sold your lands, you could have this reservation organized as a separate county. If this could be done – I do not say it can – you could govern your own people in your own way, so long as you obeyed the laws of the State." *Id.* The Yankton Sioux could have interpreted such comments to indicate that their powers of self government, which at that time were limited to lands in which Indians had a property interest, would not be further limited and that the cession of the unallotted lands would not alter the Tribe's control over the lands retained by the Indians. Although the Commissioners were careful not to make promises concerning the scope of tribal self government powers, the references to a continuing tribal government suggest the parties did not intend to disestablish the reservation.

The Commissioners' introductory remarks, however, also emphasized that the tribal members needed to adapt to the modern era and urged them to allow settlers on the then unallotted lands so that they could learn from the white man how to farm, conduct business, and be citizens. *Id.* In line with the assumption that the reservation system would soon be outmoded, Commissioner Cole admonished:

> In your old life the tribal condition was a necessity. It united you and protected you and made you strong. But you are now living under new conditions and you must drop your old forms which are not suited to these conditions

> and take up new forms suited to your new mode of life. The Government seeing this sent an allotting agent to you to help you divide you [sic] land and select your homes. . . .
>
> Now that you have your homes and that your allotted lands are more than you can make use of, you have sent word to Secretary Noble that you desire to sell your surplus lands and get money to help you to improve your farms and build good houses and buy stock. The Great Father and his Great Secretary . . . have sent us here to buy [the] surplus lands for homes for white men who will settle among you; who will live peaceably and neighborly with you; who will cultivate these surplus lands and make your allotted lands more valuable.

Id. at 50. At the time the cession agreement was negotiated, the allotment process was not even complete; many allotments remained to be finalized. *See* 1894 Commissioner Letter at 5. The concept of individual property ownership was new to the Indians, and although it was hoped allotment would stimulate individual effort to improve the land, there is little indication that this concept had taken root. *See* Report of the Yankton Indian Commission (Mar. 31, 1893), reprinted in S. Exec. Doc. No. 27, at 7, 14-16 (1893 Report). The Indians thus could easily have understood these statements to mean that the status of the lands that had been allotted to them would not be changed by the agreement, and that they would retain control over these lands as in the past.

The Commission's report to Congress highlights its hope that assimilation would be promoted by the allotment of reservation lands and the cession of those that

remained unallotted, but the report also suggests the parties recognized a division between unallotted and ceded lands. The Commission indicated that "now that [the members of the tribe] have been allotted their lands in severalty and have sold their surplus land – the last property bond which assisted to hold them together in their tribal interest and estate – their tribal interests may be considered a thing of the past." Report of the Yankton Indian Commission (Mar. 31, 1893), reprinted in S. Exec. Doc. No. 27, at 7, 19 (hereinafter Report). The Supreme Court found this language supported its conclusion that the 1894 agreement divested the Tribe of jurisdiction over the ceded lands. *Yankton*, 118 S. Ct. at 803.

This same report also indicates, however, that the ceded and nonceded lands would be treated differently, at least for as long as the Indians retained property in common, suggesting that the divestiture of jurisdiction was not complete. In explaining to Congress why they had such difficulty negotiating a price for the land, the Commissioners explained.

> On the matter of price we encountered much difficulty. Two important factors in determining the value of these lands seem to have been wholly overlooked by both the Indians and their friends: First, That the Indians were not selling their whole reservation, but less than two-fifths of it, and that more than three-fifths of it would remain in their possession for such cultivation and improvement as Indians will give to it, and free from taxation for twenty five years; second, that the surplus lands are not in one body, but scattered over the reservation and mixed up with the allotted lands of the Indians. We think

> the value of these surplus lands per acre would be doubled if the whole reservation were being disposed of by the Indians, to be equally improved by white people and uniformly taxed.

1893 Report at 13. This report is evidence of the parties' understanding that only a portion of the reservation was being separated at that time, and also suggests that the negotiations were complicated by the Indians' differing conception of land use and property ownership.

The Commission's reports do not describe any reservation boundaries or mention any transfer of the Yanktons' tribal sovereignty. *See Yankton Sioux Tribe v. Gaffey*, 14 F. Supp. 2d 1135, 1148 (D.S.D. 1998). Instead, these reports show only that the Commissioners emphasized the need for the Indians eventually to become completely assimilated into the "modern era" and encouraged them to sell their surplus lands to aid in this process. Although the sale of the surplus lands was characterized as a step required by changes of the modern era, it was not directly equated with the loss of control over other lands. In sum, the plain language of the text of Articles I and II only refers to the ceded lands, and the reports of the Commission do not indicate the "clear and plain" congressional intent required to show the reservation status of all non-ceded lands was terminated by this Act. The evidence is thus insufficient to establish that the "cession and sum certain" language of Articles I and II was intended to disestablish the reservation.

There are other provisions of the agreement which may shed light on the intended impact on unallotted lands. The State directs our attention to Articles III-VI

and XI, which established a complex system for the payment of the purchase price of $600,000. 28 Stat. 315-17. It points out that some aspects of the payment plan were linked to the twenty five year trust period and argues that this shows that such lands retained their Indian country status because the Indian title to the allotments had not yet been extinguished. The Tribe, on the other hand, argues that the provision allowing for the Act's creation of a fund to support schools, courts, and other tribal institutions evidences congressional intent to preserve tribal self government within the 1858 boundaries and to maintain reservation status for the allotted lands.

According to the agreement for payment, $100,000 was to be divided among the members of the tribe per capita, and $500,000 was to be placed into an interest bearing account for the benefit of the Tribe. Article V provided that interest from that account could be used to set up a fund to meet basic needs of the tribal members, or it would be distributed on a per capita basis to tribal members. 28 Stat. at 315. After the trust period expired on the allotted lands, any monies remaining in the original account or in the fund were to be disposed of by the Secretary of the Interior for the benefit of the Tribe. Arts. IV, V, 28 Stat. at 315. Article IX provided that the allotted land of any tribal members who died without heirs within twenty five years was to be sold and the proceeds added to the fund provided for in Article V. 28 Stat. at 315-17.

The Tribe places great emphasis on Article V because it specifically provided that some of the interest due on payment funds might be set aside and used "for the care and maintenance of such orphans, and aged, infirm, or

other helpless persons of the Yankton tribe of Sioux Indians . . . ; for schools and educational purpose for the said tribe; and for courts of justice and other local institutions for the benefit of said tribe." 28 Stat. at 315. Institutions that might have qualified for such monies included the Indian police force and the Court of Indian Offenses, both of which the district court found still operative at the time of ratification. *See Yankton Sioux Tribe v. Gaffey*, 14 F. Supp. 2d, at 1150. It is undisputed that this optional fund was never actually created, but the fact that it was provided for in the statute has relevance on the question of intent. Article V clearly foresaw continued tribal activity in providing for the needs of the Yankton Sioux in terms of education, justice, and "other local institutions." Nevertheless, section 2 of the article also contemplated a future in which such a fund would not be needed when the Indians might receive "complete title to their allotted lands and . . . assume[ ] all duties and responsibilities of citizenship." 28 Stat. at 315.

The prohibitions on the sale of alcohol found in Article XVII provide further insight into the parties' intent. This article provides that "no intoxicating liquors nor other intoxicants shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians." 28 Stat. at 318. The Supreme Court found this provision indicated that the parties intended to diminish the reservation by the Act of 1894, reasoning that the language would have been superfluous if all lands were to retain their reservation status. *See Yankton*, 118 S. Ct. at 801. The language would also have been superfluous if

the parties had intended to disestablish the Yankton Sioux Reservation. The Court found it significant that the provision "signal[ed] a jurisdictional distinction between reservation and ceded land. *Id.*" In this article the parties acknowledged the continued existence of two distinct categories of land to which different laws might apply.

Article VIII, the "agency lands provision," provides strong evidence that a reservation was expected to remain in existence. This provision provides that "[s]uch part of the surplus lands hereby ceded and sold to the United States, as may now be occupied by the United States for agency, schools, and other purposes, shall be reserved from sale to settlers until they are no longer required for such purposes." 28 Stat. at 316. As the Supreme Court noted, this provision "counsels against finding the reservation terminated." *Yankton*, 118 S. Ct. at 801. The Court cited its prior interpretation of virtually identical language in *Solem* where it reasoned that it would be " 'difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened area would remain part of the reservation.' " *Yankton*, 118 S.Ct. at 801 (citing *Solem*, 465 U.S. at 474). Congress' expectation that the federal government would continue to have a significant presence in the area for the welfare of the Tribe indicates that some lands were expected to remain outside of primary state jurisdiction.

The State argues that the retention of this land is irrelevant to our analysis because the provision does not specify that such reserved land remained in reservation status, and the federal government's continuing obligations were based on the fact that Indian allottees held

patents for their land in trust. Nothing in Article VIII specifically ties the government's retention of these lands to the trust period, however, or indicates that its obligations were expected to end when the trust period expired. Instead, the Article says that the lands would be retained "until they are no longer required for such purposes." 28 Stat. at 316. And in 1929 the lands were returned to the tribe for common purposes. Act of February 13, 1929, ch. 183, 45 Stat. 1167 (explicitly providing that the lands could not be allotted).

Neither the text of the 1894 Act nor evidence of the parties' contemporaneous understandings clearly establish an intent to disestablish the Yankton Sioux Reservation. The reports indicate that the Commissioners' statements may have sent mixed messages to the Indians in that they sometimes talked about continuing tribal control over land and sometimes suggested that the property bonds of the Indians would be severed. The Indian understanding of land use and control differed from the European American notion of individual property ownership and the Commissioners mixed messages could have led the Yankton Sioux to believe that their control over the lands retained in trust for individual members would remain unchanged. *See* Felix Cohen, *Handbook of Federal Indian Law* 131-32 (1982 ed.); *see also* Michael L. Ferch, Indian Land Rights, 2 *Transnat'l L. & Contemp. Probs.* 301 (1992) (comparing the Indian view of property rights with the western view).

The Act could not foresee all that would happen in the future with population movement, state development, and changing Indian policy, but it contained provisions showing concern for future interests of the Indians in

common, as well as provisions recognizing that conditions were sure to change as white settlers moved in to the opened reservation with the expectation of state support. In the Act, the federal government reserved land to provide for tribal needs in Article VIII, and the parties recognized a distinction between ceded and reservation lands in Article XVII. The Act did not leave all land within the original exterior reservation boundaries under tribal control, *see Yankton*, 118 S. Ct. at 805, or define new reservation boundaries, and nothing in its text or the circumstances surrounding its passage suggests that any party anticipated that the Tribe would exercise jurisdiction over non Indians who purchased land after it lost its trust status. Some articles of the Act reflect the parties' assumption that an allottee who received full title at the end of the trust period would become subject to the civil and criminal laws of the State or territory in which he resided. 24 Stat. at 389-90. Article V indicates that the fund which could be established to provide for helpless and infirm tribal members would no longer be needed "[w]hen the Yankton tribe of Sioux Indians shall have received from the United States a complete title to their allotted lands and shall have assumed all the duties and responsibilities of citizenship." 28 Stat. at 315. Congress also added the so-called "school sections clause" to the Act which parallels language in the South Dakota enabling act, Act of Feb. 22, 1889, 25 Stat. 679, and provided that certain sections of the ceded land would be reserved for common schools, 28 Stat. at 319. This suggests that as more white settlers came on to the opened lands, increased state involvement on their behalf was

expected, and the jurisdiction of the State was expected to increase over time.

In sum, the 1894 Act did not clearly disestablish the Yankton Sioux Reservation, but it intended to diminish the reservation by not only the ceded land, but also by the land which it foresaw would pass into the hands of the white settlers and homesteaders. The text of the 1894 Act, read in its full historical context, establishes that the intent was to cede certain lands to the United States and to open areas of the Yankton Sioux Reservation to white settlers, as well as to reserve land to be used to care for continued tribal interests. Until the Indian allottees would receive their lands in fee and the trust period over them would end, they could not convey land to non Indians. It was then foreseen that the trust period over the allotments would at some point come to an end, but we note that some of this allotted land apparently remains in trust to this very day.

D.

The treatment of the Yankton area in the years following the passage of the Act provides further evidence that the nonceded lands retained their reservation status until they passed out of trust. Although evidence regarding the subsequent treatment of the area cannot control when there is strong textual and contemporaneous evidence regarding the status of the land in question, *Yankton*, 118 S. Ct. at 804, courts have consistently recognized that events occurring after the passage of a surplus land act may shed light on the contemporaneous understanding of the act, *see Solem*, 465 U.S. at 4701; *see also Hagen*,

510 U.S. at 411. Established jurisdictional patterns may also over time lead to the development of justifiable expectations which the Supreme Court has found worthy of consideration. *Rosebud Sioux Tribe*, 430 U.S. at 604-05.

Congress took a definitive and considered step when it decided to return title to the Yankton Sioux Tribe for the lands that had been reserved for federal use in the 1894 Act. *See* Act of February 13, 1929, ch. 183, 45 Stat. 1167.[11] Congress not only returned the land to the Tribe, but also specifically provided that the land would not become available for allotment purposes. *Id.* Although "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," *Yankton*, 118 S. Ct. at 803, the return of these lands to tribal control suggests that the reserved lands were always intended to provide a property site for organized efforts to provide aid and education to tribal members so long as they were needed. This action indicates that at the close of the era,

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[11] References cited by the parties to administrative documents and maps, which either refer to the Yankton Sioux Reservation or lack any such reference, were found by the Supreme Court to have "limited interpretive value." *Yankton*, 118 S. Ct. at 803-04. The use of the term "Yankton Sioux Reservation" in such documents, without more, cannot be said to be a considered jurisdictional statement regarding the specific status of the remaining Indian lands. Moreover, problems associated with relying on the presence or absence of a cite on a map is illustrated by the failure of a prestigious map maker to include the states of North Dakota, South Dakota, Oklahoma and parts of Minnesota, Iowa, and Kansas in one world atlas. *See* Richard J. Margolis, "How the West Was Lost," *The New Leader*, p. 13 (Nov. 27, 1989) (discussing the omission of these states from Rand McNally's 1989 *Photographic World Atlas*).

the United States government understood, as it continues to argue today, that the Yankton Sioux reservation was not completely disestablished in 1894.

Longstanding divisions of jurisdictional authority have also been entitled to considerable weight in similar boundary disputes. *See Rosebud Sioux Tribe*, 430 U.S. at 605 n.28. The State has presented uncontroverted evidence showing that the State has assumed primary jurisdiction over unallotted lands that have passed out of trust status. The Tribe has not established reason to doubt the veracity of the various letters and reports of several Superintendents of the Yankton Agency and Commissioners of Indian Affairs which indicate that the federal government only exercised jurisdiction over allotted lands held in trust and the agency reserve. In addition, three former United States Attorneys for the District of South Dakota testified that during their tenures, which collectively cover most of the years between 1965 and 1991, the federal government continued to exercise jurisdiction only over those lands actually held in trust. The Tribe has presented evidence indicating that it maintained a tribal police force and an independent judicial system following the passage of the 1894 Act.[12] It has also presented evidence suggesting that the State did not always allocate sufficient resources to enforce its laws consistently within

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[12] The Tribe's position on this evidence is not contested. A court of Indian offenses was in existence at the time of the treaty in 1894. Although it was abolished in 1909, its duties were taken over by the Superintendent until it was reinstated in 1943. The court was replaced in 1945 with the Yankton Sioux Tribal Court, but there is no evidence that this court ever exercised jurisdiction over lands owned by non-Indians.

the original reservation boundaries. While this evidence may show problems of enforcement, it does not prove that the Tribe or the federal government exercised jurisdiction over the whole area. On the record before the court, the Tribe has not presented any new evidence to undermine the Supreme Court's statement that the Tribe has not asserted civil, regulatory, or criminal jurisdiction over lands other than those held in trust, *Yankton*, 118 S. Ct. at 804, and "the longstanding assumption of jurisdiction by the State over [a predominately non-Indian area creates] justifiable expectations which should not be upset by [a] strained . . . reading of the Acts of Congress," *Rosebud Sioux Tribe*, 430 U.S. at 604-05.

III.

In 1858 Congress designated the Yankton Sioux Reservation as an area set aside for the exclusive use of the Yankton Sioux Tribe. The status of the lands which initially comprised this reservation were later altered when the federal government allotted lands previously held in common by the Tribe to individual Indians and then purchased the remaining unallotted lands to open them up for homesteading. In *Yankton*, the Supreme Court held that the cession of the unallotted lands in 1894 removed these lands from the reservation and indicated that the 1858 boundaries were not maintained. The text of the 1894 Act and evidence regarding the parties' contemporaneous understanding of it establish that the reservation was maintained, but do not define its precise boundaries. When viewed in its full historical context, however, it is clear that the parties did not intend for the tribe to retain

control over allotted lands which passed out of trust status and into non Indian hands.

For these reasons, we hold that the Yankton Sioux Reservation has not been disestablished, but that it has been further diminished by the loss of those lands originally allotted to tribal members which have passed out of Indian hands. These lands are not part of the Yankton Sioux Reservation and are no longer Indian country within the meaning of 18 U.S.C. § 1151. We recognize that the original exterior treaty boundaries of the reservation have not been maintained. *See Yankton,* 118 S. Ct. at 799-800. We also assume that land now owned in fee by individual Indians is not under tribal jurisdiction unless it is found to be "within the limits of [the] Indian reservation." 18 U.S.C. § 1151(a). On the record before the court, however, we cannot define the precise limits of the reservation which remains.

The current amount of Indian trust land on the Yankton Sioux Reservation is unclear from the record. Since both sides have followed an all or nothing strategy (the State arguing disestablishment and the Tribe claiming maintenance of the 1858 boundaries), neither side spent much time developing the record on the specifics of this trust land. The South Dakota Supreme Court has said that the reservation was reduced by the 1894 Act "from a 410 square mile (430,495 acre) sanctuary down to what is presently scattered Indian holdings of approximately 40,000 acres." *South Dakota v. Greger,* 559 N.W. 2d 854, 859 (1997). It also stated that in modern times both Indians and non Indians refer to the reservation "as a 'mile square' " *id.,* in reference "to the tribal headquarters area at Marty," *id.* at 859 n.4. The Supreme Court later stated

in *Yankton* that currently less than ten percent of the 1858 reservation lands remains "in Indian hands," 118 S. Ct. at 804, and that within the original exterior reservation boundaries, there are only 30,000 acres held in trust for individual Indians, and 6,000 acres of "tribal lands," *id.* at 796.

References in the briefs in these cases and in judicial opinions are not always clear about what is meant by trust land. The term is variously used to include 1) the land reserved to the federal government in the 1894 Act and later returned to the Yankton Tribe, 2) land allotted to individual Indians that remains held in trust, and 3) land taken into trust under the Indian Reorganization Act of 1934. Efforts at oral argument to get precise statements from the parties identifying what trust land remains were unsuccessful. At this time we hold only that the land reserved to the federal government in the 1894 Act and then returned to the Tribe continues to be a reservation under § 1151(a), and we leave it to the district court on remand to make any necessary findings relative to the status of Indian lands which are held in trust.

The judgments of the district court are affirmed in so far as the court concluded that the Yankton Sioux Reservation has not been clearly disestablished, but the judgments are reversed in so far as the court concluded that the 1858 exterior reservation boundaries remain intact and that all nonceded lands remain part of the reservation. The permanent injunctions entered by the district court are vacated, and the cases are remanded for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

YANKTON SIOUX TRIBE, and its individual members, Plaintiffs, UNITED STATES OF AMERICA, on its own behalf and for the benefit of the Yankton Sioux Tribe, Plaintiff-Intervenor, -vs- MATT GAFFEY, States Attorney of Charles Mix County; HERMAN PETERS, BRUCE BAKKEN, and JACK SOULEK, Members of the Charles Mix, South Dakota, County Commission; WILLIAM JANKLOW, Governor of South Dakota; and MARK BARNETT, Attorney General of South Dakota, Defendants,	CIV 98-4042 MEMORANDUM OPINION AND ORDER (Filed August 14, 1998)

The YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members, and DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,	*	CIV 94-4217
Plaintiffs,	*	
-vs-	*	
SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a non-profit corporation,	*	
Defendant.	*	
**********		
SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT,	*	
Third-Party Plaintiff,	*	
-vs-	*	
STATE OF SOUTH DAKOTA,	*	
Third-Party Defendant.	*	
**********		

In *South Dakota v. Yankton Sioux Tribe*, ___ U.S. ___, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998), the United States Supreme Court held that the 1894 Act of Congress ratifying the 1892 Agreement with the Yankton Sioux Tribe for the sale of surplus tribal lands terminated the reservation status of those unallotted, ceded lands, resulting in the diminishment of the Yankton Sioux Reservation. The Supreme Court reached this decision with full acknowledgment that the "context of the [1894] Act is not so

compelling that, standing alone, it would indicate diminishment[.]" *Id.* at 802. Rather, the Supreme Court relied upon the surrounding circumstances of the Act to conclude that Congress intended to diminish the reservation. The issue remaining for decision in these cases consolidated following the Supreme Court's remand is whether the 1894 Act of Congress disestablished the Yankton Sioux Reservation.

Although the parties to this litigation have at times used the terms "diminishment" and "disestablishment" interchangeably, the Court in this opinion uses each word to convey a particular meaning. As noted by the United States Court of Appeals for the Eighth Circuit in its vacated opinion, *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 99 F.3d 1439, 1443 n.4 (8th Cir. 1996), the term "disestablishment" is "more precisely used to describe the relatively rare elimination of a reservation, *see e.g., DeCoteau v. District County Court*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975), as opposed to reduction in the size of a reservation or 'diminishment.' *See, e.g., Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977)." The Supreme Court carefully stated in *Yankton Sioux Tribe*, ___ U.S. at ___ 118 S.Ct. at 805, that its holding was limited to the narrow question of whether the 1894 Act diminished – that is, reduced the size of – the Yankton Sioux Reservation. As in *Hagen v. Utah*, 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994), the Supreme Court declined to "determine whether Congress disestablished the [Yankton Sioux] reservation altogether[.]" *Yankton Sioux Tribe*, ___ U.S. at ___ 118 S.Ct. at 805.

The Court now answers the question left open by the Supreme Court and, for the reasons explained thoroughly below, holds that the 1894 Act of Congress ratifying the cession and sale of surplus tribal lands did not disestablish the Yankton Sioux Reservation. The 1894 Act of Congress was not one of those "relatively rare" pieces of legislation that resulted in the elimination of a reservation. Rather, by ratifying the 1892 Agreement with the Yankton Sioux Tribe, Congress, in the words of the Supreme Court, modified or reconceptualized the Yankton Sioux Reservation. *See Yankton Sioux Tribe*, ___ U.S. at ___, ___, 118 S.Ct. at 798, 802. The Yankton Sioux Reservation, as diminished by the 1894 Act, encompasses all of the reservation lands that were allotted pursuant to the allotment acts, as well as the lands reserved from sale for agency, school, and other tribal purposes, within the original exterior reservation boundaries established by the 1858 Treaty with the Yankton Sioux Tribe.

Federal law defines "Indian country" as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. § 1151. The Yankton Sioux Reservation, as described above, is "Indian country" within the meaning of the federal statute.

I. Treaties and the End of Treaty-Making With the Yankton Sioux

The Yanktons belong to one of fourteen tribes in the federation of Sioux, and included 32,000 people claiming

use rights to approximately 100 million acres of land upon the arrival of non-Indians during the 17th century. H. Hoover, *A Yankton Sioux Tribal Land History* at 2 (1995). (Pl. Ex. 31.) During the 18th century, when members of the federation spread by tribes and bands to occupy the historic Sioux Country, about two thousand Yanktons took up residence over the central portion between the Des Moines and Missouri Rivers, south of the present boundary that divides North and South Dakota. *Id.* By the early 19th century, the Yankton Sioux exclusively controlled over 13 million acres of land. *Id.* The United States government formally recognized the Yankton Sioux Tribe as a political entity when the first treaty was negotiated in 1815. H. Hoover, *A History of Yankton Tribal Governance* at 1 (1995). (Pl. Ex. 78.) The United States negotiated subsequent treaties with the Yankton Sioux in 1830, 1836, 1837, 1851, and 1858. *Id.*

"After some years of earnest effort on the part of the Interior Department to induce the Yanktons to cede a portion of their territory, finally, in the fall of 1857," a military captain, with the assistance of Charles T. Picotte, a Yankton half-blood, persuaded the Yanktons to send a delegation to Washington, D.C., to confer with the Government in the early part of the winter of 1857-58. Report Of The Commissioner of Indian Affairs at 423-24 (Oct. 1, 1891). (Gov't. Ex. 18.) In the resulting April 19, 1858 Treaty, 11 Stat. 743, (Pl. Ex. 1), the Yankton Sioux Tribe ceded and relinquished to the United States:

> all the lands now owned, possessed, or claimed by them, whereever [sic] situated, except four hundred thousand acres thereof, situated and described as follows, to wit – Beginning at the

> mouth of the Naw-izi-wa-koo-pah or Chouteau River and extending up the Missouri River thirty miles; thence due north to a point; thence easterly to a point on the said Chouteau River; thence down said river to the place of beginning, so as to include the said quantity of four hundred thousand acres.

The Yankton Sioux were to have exclusive occupation of the reservation lands, along with unrestricted use of the red pipestone quarry in the State of Minnesota. A land survey later conducted revealed that 430,495 acres were included in the land mass described by the 1858 Treaty and reserved to the Yankton Sioux. S. Exec. Doc. No. 27, 53rd Cong., 2d Sess., at 5 (1894). (Pl. Ex. 5.) The land comprising the 1858 Yankton Sioux Reservation is located in the central to southeastern portion of Charles Mix County, South Dakota.

In the 1858 Treaty, the Yankton Sioux relinquished and abandoned all claims and complaints growing out of any and all treaties previously made by them or other Indian Tribes, except for their claim to annuity rights under the September 17, 1851 Treaty of Laramie. In return for the cession of land and release of claims, the United States agreed to protect the Yankton Sioux in their "quiet and peaceable possession" of the tract reserved to them. Article 10 of the Treaty provided that "[n]o white person," with certain exceptions, "shall be permitted to reside or make any settlement upon any part of the tract herein reserved for said Indians, nor shall said Indians alienate, sell, or in any manner dispose of any portion thereof, except to the United States." The government also agreed to pay the Yankton Sioux or to expend for

their benefit, starting the year of their settlement upon the reservation, the total sum of $1.6 million in annuities over a period of fifty years, ending in 1908. The government also agreed to expend additional amounts during the first year of the Tribe's settlement on the reservation for the purchase of stock, agricultural implements, and fencing, and for the construction of houses, schools, and other buildings.

In July 1859, United States Agent Alexander Redfield founded the Yankton agency between Chouteau Creek and Fort Randall. H. Hoover, *A Yankton Sioux Tribal Land History* at 3 (1995). (Pl. Ex. 31.) The Yanktons' head chief, Struck By The Ree, followed, and within a few months, some 2,000 tribal members pitched tipis close to the agency. Eight band chiefs helped to settle the tribal members on the reservation. *Id.* The Yanktons entered a "revolution in life style as they accepted confinement on the reservation." *Id.*

In 1859, surveyors marked the outer boundaries of the reservation and surveyed 166 rectangular lots for family assignment, 87 of which were downstream and 79 of which were upstream from the agency. *Id.* at 4. By 1860, there were 2,053 Yanktons on the reservation, segregated into seven bands. *Id.* A "Chief Farmer" managed the 360.73-acre agency compound at Greenwood, on the Missouri River, and "supervised agricultural development and acculturation across the reservation." *Id.* at 5.

In the years that followed the 1858 Treaty, the federal government did not provide the Yanktons all of the financial assistance promised. Settled close to the Missouri River or in the breaks of the Missouri Hills, the Yanktons

broke prairie sod, opened farms, and built log homes. Report of the Commissioner of Indian Affairs at 424 (Oct. 1, 1891). (Gov't. Ex. 18.) Drought set in and burned up the crops, followed by devastating floods. As a result, the Yanktons believed that the Great Spirit was offended at them for cultivating the soil. *Id.* "Their work oxen and cows were soon in the soup, farm tools and wagons were soon thrown aside to rot, their clothing was cast off, and the whole nation went off on a buffalo hunt." *Id.* Upon their return many months later, the Yankton Sioux "found the Santees, their old-time allies, had opened up a horrid frontier war against the whites, and that emissaries from the hostile bands were waiting to counsel with them to engage the Yanktons also in hostilities against the Government." *Id.*

In 1864, when the Santee Sioux were raiding and killing the settlers of Minnesota, General Sully, at Fort Randall, enlisted in the service of the United States as scouts fifty-one Yankton Indians. "They took the field at once against their own kindred in defense of the white inhabitants of Dakota and Nebraska, and drove back the hostile Santees." Report of the Commissioner of Indian Affairs at 48 (1878). (Gov't. Ex. 18.) The Yankton scouts were honorably discharged at the end of the war, but without any pay, *id.*, a matter that would surface as a major point of contention with the Yanktons during discussions about the sale of their surplus lands in 1892. In the early 1880's, the Yankton Sioux claimed that, unlike other Indian tribes, "the blood of no white person stains their hands." Report Of The Commissioner of Indian Affairs at 61 (1881). (Gov't. Ex. 18.) The Yanktons viewed themselves as "[a]lways at peace and friendly even to

taking up arms against their own relations," and believed that, as a result, they "should receive greater consideration and benefit from [the white] people and government; that on the contrary they receive less, while those who fought the government imbued their hands in white man's blood, and obtain all they ask." *Id.*

In 1869, Moses K. Armstrong conducted a second survey of family lots on the Yankton Sioux Reservation, marking 177 lots of 80 acres each. H. Hoover, *A Yankton Sioux Tribal Land History* at 5 (1995). (Pl. Ex. 31.) In 1874, J.W. Beaman surveyed additional lots of 40 acres each, to make one available for each family. While several missionaries visited the reservation, Presbyterian John P. Williamson arrived as the first resident missionary in 1869, and Episcopal Father Joseph Cook settled in Greenwood in 1870. *Id.* at 4. As mission and federal facilities were built, "agency personnel gradually replaced 'recalcitrant' band chiefs with others more amenable to federal objectives[.]" *Id.* The growing population of non-Indian farmers, businessmen, and railroad men in the Upper Midwest pressured federal officials to open the surplus lands of Indian reservations for settlement.

"The decade of the 1860's was marked by an increasing volume of general Indian legislation [by Congress], coincident with a decline in the use of Indian treaties as an instrument of national policy. . . . The formative era of Indian relations ended with the Appropriations Act of March 3, 1871, providing for the termination of treaty making with Indian tribes." F. Cohen, Handbook of Federal Indian Law 126-27 (1982) (footnote omitted) (hereinafter Cohen). Codified at 25 U.S.C. § 71, the statute provided:

> No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.

At least one commentator suggests that the "end of treaty making assumes an exaggerated historic importance unless understood in light of the comprehensive nature of federal involvement in Indian affairs." Cohen at 127 (footnote omitted). In the commentator's view,

> [t]he primary reason for the termination of treaty making in 1871 was political, the result of the House of Representatives' desire to have more control over Indian affairs and over the lands being ceded by the tribes. The federal-Indian relationship continued much as it had before 1871. Negotiations with tribes and land cessions resulted in "agreements" rather than treaties, and were ratified by both houses of Congress. Congress continued to establish reservations, make appropriations, and enact statutes affecting Indians. Like treaties, agreements and statutes are the "supreme law of the land," creating rights and liabilities that are virtually identical to those established by treaties.

Cohen at 127 (footnotes omitted). The prohibition on treaty-making "was a domestic political decision with little legal impact on the continuing relationship between the United States and Indian tribes[,]" and caused the federal government to look to other procedural methods in dealing with the Indian tribes. *Id.* at 128.

After 1871, a trend developed toward more comprehensive legislation as the government gradually moved away from the "tribe-by-tribe approach of the treaty making years. The result was a steady increase in statutory power vested in Indian service officials and a steady narrowing of the rights of individual Indians and tribes." Cohen at 128. The process of allotment of tribal lands in severalty and the assimilation of the Indians into white culture was deemed to be important for Indians and non-Indians alike. *Id.* Years of debate on allotment proposals followed. *Id.* at 131.

On February 8, 1887, Congress passed the General Allotment Act, also known as the Dawes Act, 24 Stat. 388, which mandated the allotment of land to individual tribal members on the reservations and negated the previous family assignments of land parcels. H. Hoover, *A Yankton Sioux Tribal Land History* at 5-6 (1995). (Pl. Ex. 31.) The Dawes Act did not expressly mandate the elimination of reservations. Senator Dawes, sponsor of the bill, had favored a voluntary program of allotments, but eventually supported compulsory allotment because he became convinced, like the humanitarian reformers, that destruction of the tribal system was inevitable if Indians were to participate fully in the American system. Cohen at 131. Allotments of land to individuals were thought to be of primary importance because the Indian concept of tribally-owned land was fundamentally different from the whites' concepts of civilization and individual land ownership, and the whites' view was considered to be superior. *Id.* White reformers also thought that a government patent would create greater security for the Indian allottee than would possession of land under tribal law or

custom and that settling the Indians in a permanent place would end their nomadic behavior. Indians who favored allotment placed faith in the patent in fee as protection against white encroachment and removal by the government. Cohen at 132.

The Dawes Act provided:

> That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon[.]

24 Stat. 388. Each head of a family was to receive one quarter section of land (160 acres), each single person over eighteen years of age and each orphan child under eighteen years of age was to receive one-eighth of a section (80 acres), and each single person under eighteen years of age or born prior to the date of the President's order directing allotment of the land was to receive one-sixteenth of a section (40 acres). *Id.* The Dawes Act further provided in section 5 that, upon approval of the allotments by the Secretary of the Interior, the Secretary would issue a patent in the name of each allottee, to be held in trust by the United States for twenty-five years for the sole use and benefit of the Indian allottee, and in

the case of the allottee's death, for the sole use and benefit of the allottee's heirs. Section 5 provided that, at the end of the trust period, the United States would convey the allotment

> in fee, discharged of said trust and free of all charge or incumbrance whatsoever . . . And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void[.]

24 Stat. at 389. Congress gave the President authority to extend the trust period in his discretion. *Id.*

Section 5 of the Dawes Act, significantly for this litigation, further provided:

> That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, *of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell,* on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress[.]

24 Stat. at 389-90 (emphasis added).

The Dawes Act stated in section 6 that, upon completion of the allotments and the issuance of patents to the allottees, the allottees would be subject to the civil and criminal laws of the State or Territory in which they resided. Moreover, each allottee "who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States." *Id.* at 390.[1]

Some of the Yanktons resisted the new allotment policy, and four companies of troops were sent from Fort Randall to quell the disturbances and restore order. H. Hoover, *A Yankton Sioux Tribal Land History* at 6 (1995). (Pl. Ex. 31.) Allotting Agent J.G. Hatchett arrived in 1889

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[1] In 1905, the Supreme Court interpreted section 6 of the Dawes Act "to mean that Indian allottees were subject to plenary state jurisdiction immediately upon issuance of the trust patent. *See In re Heff*, 197 U.S. 488, 25 S.Ct. 506, 49 L.Ed. 848 (1905)." *Cass County v. Leech Lake Band of Chippewa Indians*, ___ U.S. ___, 118 S.Ct. 1904, 1907, 139 L.Ed.2d 285 (1998). Congress reversed the result of the *Heff* case in 1906 by passage of the Burke Act, 34 Stat. 182, 25 U.S.C. 349, *et. seq.*, providing that state jurisdiction did not attach until the end of the 25-year trust period, when the lands were conveyed in fee to the allottees. *See United States v. Pelican*, 232 U.S. 442, 450, 34 S.Ct. 396, 58 L.Ed. 676 (1914). The Burke Act, however, also contained a proviso permitting the Secretary of the Interior, if "satisfied that any Indian allottee is competent and capable of managing his or her affairs," to authorize issuance of a fee simple patent before the end of the usual trust period, removing all restrictions as to sale, incumbrance, and taxation of the land. *Cass County*, ___ U.S. at ___ 118 S.Ct. at 1907. The effect of the Burke Act and other post-ratification statutes on the Yankton Sioux allotments will be addressed later in this opinion.

to parcel out the individual allotments on the Yankton Sioux Reservation. *Id.* Protests by the Indians hampered his work, *id.*, but the allotments were completed that year and in 1890, Hatchett equalized the allotments, utilizing approximately one-half of the reservation. Report of the Commissioner of Indian Affairs at 428 (Oct. 1, 1891). (Gov't. Ex. 18.) Hatchett continued to refine the list of allotments, and in 1892 reported the assignment of 1,700 allotments on approximately 262,000 acres of the Yankton Sioux Reservation. H. Hoover, *A Yankton Sioux Tribal Land History* at 6 (1995). (Pl. Ex. 31.) Hatchett's report negated all previous land assignments, and tribal members were required to scatter on their new family farms located across the reservation. *Id.* at 6 & n.15.

Of the 430,495 acres of land comprising the 1858 Yankton Sioux Reservation, 167,325 acres were allotted and patented to the Indians under the Dawes Act. By early 1894, allotments under the Act of February 28, 1891, 26 Stat. 594, had been made in the field, but those allotments had not been examined and approved. The federal government estimated that some 95,000 additional acres had been allotted after passage of the 1891 Act, leaving surplus lands of approximately 168,000 acres, which were ceded by the Yankton Sioux for $600,000, or $3.62 per acre.[2] S. Exec. Doc. No. 27, 53rd Cong., 2d Sess., at 5 (1894); (Pl. Ex. 5.)

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[2] The Court of Claims later determined that the Yankton Sioux ceded 201,110 unallotted acres in the 1892 Agreement and that those acres had a fair market value of $1,337.381.50, [sic] or about $6.65 per acre, on December 31, 1892. *Yankton Sioux Tribe v. United States*, 623 F.2d 159, 174 (Ct.Cl. 1980).

Congress having officially ended treaty-making with the tribes in 1871, the last large-scale sale of land to the United States by the Yankton Sioux Tribe occurred as a result of an 1892 Agreement, after an 1884 government attempt to obtain the sale of the Yanktons' surplus lands failed. S. Exec. Doc. No. 27, 53rd Cong., 2d Sess., at 12 (1894); (Pl. Ex. 5.) In 1892, the Secretary of the Department of the Interior appointed three members to serve on the Yankton Indian Commission to negotiate the sale of the surplus land owned by the Yankton Sioux. (Pl. Ex. 28.) The three commissioners were John J. Cole, J.C. Adams, and Dr. W.L. Brown; however, Dr. Brown resigned from the Commission before an agreement was reached, and his replacement, L.W. French, was never qualified to act as a Commissioner and took no part in the negotiations. S. Exec. Doc. No. 27, 53rd Cong., 2d Sess. at 7-8, 34 (1894); (Pl. Ex. 5.) These discussions did not take place with tribal leaders in Washington, D.C., as had the negotiations resulting in the 1858 Treaty. The Commissioners were sent to the Yankton Sioux Reservation "to negotiate . . . for the cession of their surplus lands," and "[i]f [the Yankton Sioux] are unwilling to cede all the surplus land you will endeavor to obtain the relinquishment of such part thereof as they may be willing to part with."[3] Instructions to the Yankton Indian Commission (July 27, 1892), reprinted in *Yankton Sioux Tribe* U.S. Supreme Court Joint Appendix Vol. I at 98-99.

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[3] The Court agrees with the Eighth Circuit's earlier conclusion from these instructions that, "[h]ad the intent been the elimination of the reservation, it would have been necessary that all surplus lands be purchased." *Yankton Sioux Tribe*, 99 F.3d at 1452.

Although the 1894 Congress and courts have been careful to distinguish between the 1858 "Treaty" and the 1892 "Agreement," *see, e.g.*, S. Exec. Doc. No. 27, 53rd Cong., 2d Sess. at 1 (1894) (Pl. Ex. 5.); *Yankton Sioux Tribe*, ___ U.S. at ___ 118 S.Ct. at 793, the Commissioners sent to the reservation and the Yankton Sioux repeatedly mentioned during the 1892 discussions concerning the sale of surplus lands that their work would result in a "treaty" that would be ratified by Congress. Before the Commissioners left the Yankton Sioux Reservation for Washington to present the 1892 Agreement to Congress, a copy of the Agreement was left in the Yanktons' treaty book, which was turned over to Rev. Williamson for safekeeping. S. Exec. Doc. No. 27, 53rd Cong., 2d Sess. at 48-96, 97 (1894). (Pl. Ex. 5.) Moreover, then Secretary of the Interior Hoke Smith, in the first sentence of his 1894 cover letter submitting the Agreement and the reports of the work underlying it to Congress, stated that he had the honor "to submit herewith an agreement made by the commission appointed to treat with the Yankton tribe of Dakota or Sioux Indians[.]" *Id.* Similarly, the Acting Commissioner of Indian Affairs referred to the Agreement as a "treaty" in his report to the Secretary of the Interior, *id.* at 5, and those chiefs and head men of the Yankton Sioux Tribe who wrote to Congress urging ratification of the Agreement referred to it as the "treaty of December 31, 1892." S. Rep. No. 196, Committee on Indian Affairs, 53rd Cong., 2d Sess. at 2 (1894). (Pl. Ex. 7.)

These references to treaty-making by the primary participants are significant, because the references establish that the Tribe, which likely was not aware that Congress technically had ended treaty-making by statute in

1871, nonetheless continued to view its interactions with the federal government within the historic context of the political relationship that had existed between the Tribe and the federal government beginning with the Treaty of 1815. The references also confirm the commentator's view that the "federal-Indian relationship continued much as it had before 1871[,]" Cohen at 127, and that the only major difference between a "treaty" and an "agreement" was that both Houses of Congress had to ratify an "agreement," while only the Senate ratified a treaty.

II. The Sale of Surplus Lands and the 1892 Agreement

The crucial question presented is whether the 53rd Congress, legislating during the allotment era, intended by the Act of 1894, ratifying the 1892 Agreement with the Yankton Sioux, to disestablish the Yankton Sioux Reservation completely. This becomes a highly complicated question in light of the Supreme Court's *Yankton Sioux Tribe* decision holding that the Yankton Sioux Reservation is diminished to the extent of the surplus lands sold through the 1894 Act. Diminishment ordinarily suggests a shrinking of the land mass reserved to the tribe, with a clear demarcation between the land removed from reservation status, and the land retained in reservation status. *See, e.g., Rosebud*, 430 U.S. at 606-615, 97 S.Ct. at 1373-1377 (holding that congressional acts diminished boundaries of Rosebud Reservation by removing from reservation land situated in four counties of South Dakota).

Such a clear demarcation is not present here, where the Yankton Sioux allotments purposely were interspersed over the entire 1858 reservation to help ensure

that the Indians would live closely with the whites who settled on the intermingled ceded lands and thereby assimilate into white culture. The Supreme Court recognized that diminishment ordinarily affects the placement of reservation boundaries, *see Yankton Sioux Tribe*, ___ U.S. ___, 118 S.Ct. at 798, 799, 800, but nowhere in its opinion did the Supreme Court explain how the Yankton Sioux Reservation boundaries changed as a result of the diminishment. The court stopped short of holding the Yankton Sioux Reservation terminated or disestablished as it could have done if it thought *DeCoteau* was controlling, *id.* at 805, and instead signaled at points in its opinion that perhaps the reservation is not disestablished. *Id.* at 801, 805. The Supreme Court spoke of Congress intending by the 1894 Act "to modify the reservation," *id.* at 798, or to work "a reconception of the reservation[.]" *Id.* at 802. The Supreme Court did not elaborate upon how such a modified or reconceived reservation should be envisioned. If the original exterior boundaries remain, as it appears they do from the Supreme Court's opinion, then the Supreme Court has effectively created within those boundaries an " 'impractical pattern of checkerboard jurisdiction,' " a result which the Supreme Court in the past has disfavored as contrary to the approach preferred by Congress and codified at 18 U.S.C. § 1151, to avoid jurisdictional confusion. *See Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 478, 96 S.Ct. 1634, 1643-44, 48 L.Ed.2d 96 (1976) (quoted case omitted); *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 358, 82 S.Ct. 424, 428-29, 7 L.Ed.2d 346 (1962). Because the Supreme Court has not explained how the diminishment affected reservation boundaries, this Court "cannot

assume that Congress would intend to change the reservation to an area without defined boundaries and, in addition, create a confusing checkerboard pattern of jurisdiction." *United States v. Long Elk*, 565 F.2d 1032, 1039 (8th Cir. 1977).

The Tenth Circuit confronted an identical boundary problem following the Supreme Court's diminishment decision in *Hagen*. *See Ute Indian Tribe of Uintah and Ouray Reservation v. Utah*, 114 F.3d 1513 (10th Cir. 1997), *cert. denied sub nom. Duchesne County v. Ute Indian Tribe of Uintah and Ouray Reservation*, 118 S.Ct. 1034 (1998). The *Hagen* decision, which affirmed a judgment of the Utah Supreme Court, directly conflicted with a prior en banc decision of the Tenth Circuit that the Uintah Valley Reservation was not diminished or disestablished. After *Hagen*, the Tenth Circuit recalled its mandate and modified its previous decision only to the extent necessary to reconcile the opinion with *Hagen*. *Ute Indian Tribe*, 114 F.3d at 1528. The Tenth Circuit held, consistently with *Hagen*, that Acts of Congress between 1902 and 1905 diminished the reservation to the extent of the unallotted lands that were opened to non-Indian settlement, but that the Acts did not entirely disestablish the reservation. *Id.* The court concluded that the original exterior reservation boundaries remained intact and that all lands originally allotted to tribal members remained within the limits of the reservation and constituted Indian country under 18 U.S.C. § 1151(a), even though a substantial portion of those allotted lands had passed into fee status after 1905. *Id.* at 1529-30. When given the opportunity to grant a petition for certiorari and review the Tenth Circuit's decision, the

Supreme Court declined and denied the petition for a writ of certiorari.

The disestablishment question now before this Court closely mirrors the issue before the Tenth Circuit in *Ute Indian Tribe*, and the Court draws some guidance from that opinion. But each agreement with an Indian tribe is different and must be evaluated in light of all the circumstances attendant to its making. *Hagen*, 510 U.S. at 410-13, 114 S.Ct. at 965-66. Thus, the Court begins its analysis from the familiar legal premise that Congress created the Yankton Sioux Reservation in the 1858 Treaty, and only Congress can eliminate it by explicitly indicating its intent to do so. *See Solem v. Bartlett*, 465 U.S. 463, 470, 104 S.Ct. 1161, 1166, 79 L.Ed.2d 443 (1984). The Supreme Court "does not lightly conclude that an Indian reservation has been terminated," *DeCoteau*, 420 U.S. at 443, 95 S.Ct. at 1092, and this Court likewise will not lightly reach such a determination. Once Congress has established a reservation, all tracts included within it are a part of the reservation until separated from it by Congress. *Id.*, 420 U.S. at 443, 95 S.Ct. at 1092-93. The 1894 Act of Congress which opened the Yankton Sioux Reservation to allow non-Indians to purchase land and settle there and which, according to the Supreme Court, diminished the size of the reservation only to the extent of the ceded lands, is not inconsistent with the preservation of the 1858 Treaty boundaries. *See Solem*, 465 U.S. at 470, 104 S.Ct. at 1166; *DeCoteau*, 420 U.S. at 444, 95 S.Ct. at 1093. Ambiguities must be resolved in favor of the Yankton Sioux, *see Hagen*, 510 U.S. at 411, 114 S.Ct. at 965, and the Supreme Court "requires that the 'congressional determination to terminate . . . be expressed on the face of the

Act or be clear from the surrounding circumstances and legislative history.' " *DeCoteau*, 420 U.S. at 444, 95 S.Ct. at 1093. Thus, to follow the disestablishment inquiry as defined in *DeCoteau*, the Court must consider the language of the 1894 ratification statute and the 1892 Agreement it incorporated, as well as the legislative history of the Act, and the surrounding historical circumstances.[4]

The Court believes it is helpful to begin with the historical circumstances surrounding the making of the 1892 Agreement as documented in the reports of the Yankton Indian Commission. S. Exec. Doc. No. 27, 53rd Cong., 2d Sess. at 48-97 (1894); (Pl. Ex. 5.) (hereafter "Negotiations".) These detailed reports provide clear

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[4] While one might reason that subsequent acts of Congress should be examined to see if they shed any light on the meaning of the 1894 Act, the Supreme Court disapproves of such an approach, noting that " 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *Yankton Sioux Tribe*, ___ U.S. ___, 118 S.Ct. at 803 (quoted case omitted). It appears, moreover, that the Supreme Court similarly eschews giving weight to evidence explaining the actions of the President and the executive departments in implementing the intent of Congress or to evidence showing the understanding of non-government parties. In reaching its decision that the Yankton Sioux Reservation is diminished, the Supreme Court summarily dismissed "the scores of administrative documents and maps marshaled by the parties to support or contradict diminishment" because such evidence had "limited interpretative value." *Id.* at 803-04. Rather, for the foundation of its decision, the Supreme Court relied upon the "strong textual and contemporaneous evidence" to find diminishment. *Id.* at 804. This Court likewise focuses upon the strong textual and contemporaneous evidence surrounding the 1894 Act and the making of the 1892 Agreement to determine that the Yankton Sioux Reservation was not disestablished.

insight into the mindset of the Commissioners and the Yankton Sioux as they negotiated for the sale of the surplus lands. These reports were included in the legislative history of the 1894 Act ratifying the 1892 Agreement, and the Senate and House Reports forwarding the Act from the Committees on Indian Affairs to the floor called special attention to the report of the Yankton Sioux Commission and all of their proceedings. S. Rep. No. 196, Committee on Indian Affairs, 53rd Cong., 2d Sess. at 1 (1894) (Pl. Ex. 7); H. Rep. No. 570, Committee on Indian Affairs, 53rd Cong., 2d Sess. at 1 (1894). (Pl. Ex. 8.)

A. The Reports of the Yankton Indian Commission

The Commissioners held ten councils which were attended by the Indian Committee of 24 named to represent the Yankton Sioux Tribe, the ten moderators, the chiefs, the head men, and varying numbers of members of the Tribe. The first two of the ten councils occurred on October 8th and 24th of 1892, and the remaining eight councils occurred between December 2nd and 17th of 1892. Very little, if any, discussion during the councils was directed to hammering out the terms of the twenty Articles that ultimately became the 1892 Agreement. Negotiations at 48-97. Tribal members generally spoke in favor of or in opposition to the sale of the surplus lands, expressing explicitly their perceived view of themselves as ignorant and inferior to the wiser, educated Commissioners. *Id.* at 52.[5] The Indians' speeches were laced with

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[5] In deciding a dispute over the western boundary of the Yakima Indian Reservation in 1913, the Supreme Court said that

suspicion and distrust of the United States because of previous unhonored treaty terms, and with paramount concern for the price the United States would pay for the surplus lands. The Committee of 24 developed a list of twelve propositions, or grievances, that the Tribe wanted addressed in the agreement to sell the surplus lands. *Id.* at 52, 57. The Commissioners eventually agreed to incorporate as many of the propositions as their instructions from Washington would allow. *Id.* at 60. Along the way, however, the Commissioners attempted to convince the Indians that they could not resist the tide of change, that the President and the Secretary of the Interior were their friends, that the United States had fulfilled all terms of the 1858 Treaty, that the United States would deal fairly with the Indians, and that sale of the surplus lands was in the Tribe's best interest. *Id.* at 65-69.

What is clear throughout the Commissioners' reports of their councils with the Tribe is that their mission was to obtain the sale of the surplus lands, and no more. This Court, the Eighth Circuit, and the Supreme Court each acknowledged in the previous stage of this litigation that the parties, in reaching the 1892 Agreement, did not discuss the future boundaries of the reservation or the relinquishment of the entire reservation by the Tribe, but memorialized only the consent of the Tribe to sell the surplus lands remaining after the allotment process was

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its "effort must be to ascertain and execute the intention of the treaty makers, and as an element in the effort we have declared that concession must be made to the understanding of the Indians in redress of the differences in the power and intelligence of the contracting parties." *Northern Pacific Ry. Co. v. United States*, 227 U.S. 355, 362, 33 S.Ct. 368, 57 L.Ed. 544 (1913).

completed. *Yankton Sioux Tribe*, 890 F.Supp. at 883-84; *Yankton Sioux Tribe*, 99 F.3d at 1453; *Yankton Sioux Tribe*, ___ U.S. at ___ 118 S.Ct. at 795. If the Commissioners had intended to terminate the reservation and communicated that to the Indians, that would have made their mission even more difficult.

Comments made by the Commissioners during the councils with the Yankton Sioux support the conclusion that the Commissioners and the Tribe did not perceive their work as causing a complete disestablishment of the reservation. In his earliest comments during the first council with the Tribe, Commissioner Adams stated, "We understand that you each received an allotment of land on which to make a home. . . . we also understand that you own, outside of your allotments, a large quantity of land in common. It is this land that you own in common that we were appointed by the Great Father to talk to you about." Negotiations at 48. Although these comments immediately bring to mind the Dawes Act and the policies behind it, what Commissioner Adams had to say to the Tribe just a few moments later is striking. He said: "It might be, after you sold your lands, you could have this reservation organized as a separate county. If this could be done – I do not say it can – you could govern your own people in your own way, so long as you obeyed the laws of the State. I do not say this can be done, but see no good reason why it might not be done." *Id.* Commissioner Adams apparently held the view that the allotment policy and tribal self-government could co-exist, and he set the tone for the negotiations by conveying such a view in his very first address to the Tribe.

Likewise, during the first council, Commissioner Cole told the Indians that the "Great White Father . . . does not want you to sell your homes that he has allotted to you. He wants you to keep your homes forever. He only wants you to sell your surplus lands for which you have no use." *Id.* at 49. Cole assured the Indians, "[y]ou not only have a home as a tribe, but every man, woman, and child among you each now has a home which no one can take away from you and the Great White Father wants you to always keep these homes and live on them in peace and comfort like white men, and be citizens and have plenty." *Id.* Cole also remarked, "The Great Father and his Great Secretary [of the Interior], Mr. Noble, think you have acted wisely in selecting your homes in severalty. . . . They have sent us here to buy these surplus lands for homes for white men who will settle among you; who will live peaceably and neighborly with you; who will cultivate these surplus lands and make your allotted lands much more valuable." *Id.* at 50. In response to the statements of Adams and Cole, Henry Stricker replied, "if you will help us we hope we will make a treaty that will be beneficial to us as a tribe." *Id.*

At the second council, the tribal members asked to see the form contract held by the Commissioners, which was produced. Remarkably, a question arose whether the tribal members would be permitted to make comments about the provisions contained in the form agreement, and this apparently generated extensive discussion. The Commissioners reported to Congress that "[i]t was finally agreed that [the agreement] should be translated to the council and such comments as may be made by any of the committee of 24, could not, and should not be considered

final." *Id.* at 51. The contract was then read article by article through oral translation into the Dakota language and, at the Tribe's request, the contract was also translated in a written form for use and consideration by the Committee of 24. *Id.* With that, the council ended.

In the series of eight councils that occurred during the sixteen-day period from December 2 to December 17, 1892, more comments were made suggesting that the Commissioners and the tribal members thought the intent of the "Great White Father" was to open the reservation for settlement rather than to disestablish it. Robert Clarkson, a member of the Tribe, said, "White men see our surplus lands every day traveling through it. They have a lawyer sent to Congress to open this reservation and surplus land." *Id.* at 61. Commissioner Brown acknowledged that the 1858 Treaty "set aside for your people a reservation with certain boundaries[,]" which was supposed to contain 400,000 acres. *Id.* at 66. He admonished the Tribe to consider that, when the reservation was surveyed, it actually contained 430,495 acres, "more than the Government agreed to let you have." *Id.* He assured the Indians that "schoolhouses will be put up all over the agency[.]" *Id.* at 67.

To convince the Indians that the strong federal government was looking out for the interests of the poorer Tribe, Commissioner Brown gave as an example two Indians, one strong and well-looking, and one half-starved, asking the Commissioners to divide a piece of beef between them. He said "it would be natural and right to give the one who was sick more than the other . . . and if we make this treaty we want to give you the biggest half." *Id.* at 67. Commissioner Cole named as the

"principal object of the treaty" to make both the allotted and the surplus lands valuable, *id.* at 68, and explained potential differences in income to tribal members, to be derived primarily from land rent, "after the surplus lands have been occupied by white people." *Id.* at 69. A dominant theme of the Commissioners was that the government wanted the Indians to live close to the white settlers so that the Indians could emulate the non-Indians, *see id.* at 71-72, but the reason given was not the government's desire to eliminate the reservation. Rather, the Commissioners reminded the Indians that, with the loss of wild game and a declining ability to roam and hunt as in the past, the Indians needed to adapt to the changed conditions around them, and to learn to obtain their food, clothing, and income like white men. *Id.* at 71-72.

Commissioner Adams instructed the Indians as to how they might rent the uncultivated portions of their allotments to white men to generate cash income, using as an example his personal experience at the Sissetons' reservation. *Id.* at 72-73. The Commissioners had already told the Yanktons that the $2.50 per acre that the United States paid the Sisseton-Wahpeton Sioux Tribe for the surplus lands on the Lake Traverse Reservation in 1891, the year before, was the highest price Congress had ever paid for surplus Indian lands. *Id.* at 68. Despite the Sissetons' sale of all of their surplus lands, Commissioner Adams viewed the Lake Traverse Reservation as still in existence:

> Here is the line of the Sisseton Reservation in my county. I live here, about 15 miles from the line of the Sisseton. Right here lives a friend of

> mine by the name of Vick, just outside the reservation line. Just inside of the line of the reservation lives an Indian friend of mine by the name of Chunek. He has land which has plenty of grass upon it. Vick asked Chunek to let him cut grass on his land. He agreed to and Vick was to pay 50 cents per ton for all he cut. This man cut 150 tons of hay and paid Chunek $75 for it. Chunek did not do anything but lie in the grass and see others work and got $75. It was just as if Chunek had gone out into the middle of the road and picked it up. Now, my friends, what made the grass on Chunek's farm worth money? Because his tribe had sold their surplus land and he had become a citizen of the United States and could rent his land. This he could not do until the surplus land was sold to the Government. If this Indian can do this why cannot you?

Id. at 72. Considering these remarks, and this Commissioner's earlier comments that it might be possible to "have this reservation organized as a separate county[,]" and "you could govern your own people in your own way, so long as you obeyed the laws of the State[,]" the Yankton Sioux reasonably could have concluded that, as a result of the sale of their surplus lands, the "Great Father" would, in time, make them citizens of both the State of South Dakota and the United States, and yet permit them to continue to govern themselves as a Tribe on the allotted lands.

Despite all of the efforts of the Commissioners, during the council on December 10, 1892, some tribal members reported the Indians had stayed up night and day debating the matter, but had decided not to sell their surplus lands. *Id.* at 73. Other tribal members disagreed,

saying the Tribe was willing to sell, but the only disagreement was price. Commissioner Cole became adamant:

> Now, I want you to understand that you are absolutely dependent upon the Great Father today for a living. Let the Government send out instructions to your agent to cease to issue these rations, let the Government instruct your agent to cease to issue your clothes. Let the Government instruct him to cease to issue your supplies, let him take away the money to run your schools with, and I want to know what you would do. Everything you are wearing and eating is gratuity. Take all this away and throw this people wholly upon their own responsibility to take care of themselves, and what would be the result? Not one-fourth of your people could live through the winter, and when the grass grows again it would be nourished by the dust of all the balance of your noble tribe.
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> [The Great Father] did not send this commission until every one of you, down to the smallest baby, *has a home of their own on this reservation*.

Id. at 74-75 (emphasis added). From this speech and the fact that the Yanktons had lived on family allotments on the reservation for thirty-three years, the Yanktons could, and most probably did, draw the conclusion that their individually allotted lands remained in reservation status, but that the continuation of their annuities and all other forms of federal financial assistance depended upon their agreement to sell the surplus lands. Yankton Agent Foster then spoke in favor of the Agreement, but advised the Tribe not to settle on the price. *Id.* at 75. Felix Brunot called for a vote, which caused confusion and

wrangling among the factions of the Tribe favoring and opposing the sale. *Id.* at 76. Commissioner Cole refused to recognize any vote because less than a majority of the adult male members of the Tribe were present. *Id.*

At the next council, the Commissioners asked the Committee of 24 to designate six individuals, representing the factions in the Tribe, to meet with the Commission to draft a treaty. *Id.* at 76-77. This proposal also met with disagreement because tribal members believed the Commission refused to recognize the stated decision of the Committee of 24, representing the Tribe, not to sell the surplus lands. *Id.* at 78. Cole defended his proposal of a subcommittee as necessary to work out the small details. The friends of the treaty appointed three members to the proposed subcommittee, but the opposition understandably did not present any members for such service. *Id.* at 78, 81.

In the last council, on December 17, 1892, Commissioner Brown resigned to eliminate any possibility that he was the cause of the Tribe's refusal to sell the surplus lands, as he had heard rumors that he was to blame. *Id.* at 79. Commissioner Cole then eloquently addressed the Tribe:

> This reservation alone proclaims the old time and the old conditions. But even here the means of your former mode of life have vanquished. The tide of civilization is as resistless as the tide of the ocean, and you have no choice but to accept it and live according to its methods or be destroyed by it. *To accept it requires the sale of these surplus lands and the opening of this reservation to white settlement.*

Id. at 81 (emphasis added). The council adjourned, and approximately two weeks later, on December 31, 1892, the Commissioners announced their completion of an Agreement for the sale of the surplus lands, after their consultation with the chiefs and head men and the white missionaries considered to be friends of the Tribe. *Id.* at 83-84.

At no point in the Commissioners' reports is there any mention, by a Commissioner or by a Yankton Sioux, of any anticipated change in the reservation boundaries or of a disestablishment or termination of the Yankton Sioux Reservation. At no point in the Commissioners' reports is there any mention of a transfer of the Yanktons' tribal sovereignty to the United States or the State of South Dakota.

On January 3, 1893, missionary John Williamson sent a letter to Commissioner Cole, stating that he thought the terms were the most liberal the Indians would get, that he had no doubt the provisions would be faithfully carried out, and "further there is no cause for apprehension that this agreement will in any way interfere with the treaty of 1858." *Id.* at 84. Joseph Cook, the Episcopal missionary, concurred with Williamson that the Agreement was advantageous for the Tribe. *Id.* A draft of the Agreement was sent to Secretary of the Interior Noble in January 1893, and his minor suggested changes were made. *Id.*

There is no indication in the Commissioners' reports that the Yanktons reached a consensus to support the Agreement. To the contrary, the Commissioners' reports

in early 1893 describe vehement opposition to the Agreement and hardships the Commissioners faced in obtaining signatures to the Agreement by the majority of the adult male members of the Tribe. *Id.* at 85-97. Councils were held to read the Agreement to the tribal members, and the Commissioners waited day after day for tribal members to come to them and sign the Agreement. The Commissioners traveled across the reservation looking for elderly and infirm signatories, and even crossed into Nebraska to take the signatures of Yankton soldiers who were not present on the Yankton Sioux Reservation during the negotiations. *Id.* at 92-93. By March of 1893, the Commissioners obtained a sufficient number of signatures – 255 of the 458 members eligible to sign – and the Commission departed for Washington. *Id.* at 21, 97.

Two federal investigators were sent separately to the Yankton Sioux Reservation in 1893 to investigate allegations of fraud in the procurement of signatures on the Agreement. Indian Inspector John W. Cadman reported in November 1893 that he had uncovered only one incident of possible undue influence, but that he did not believe such had occurred in that case. He also reported that some tribal members who had signed the Agreement wished to change their minds, while others wished to sign the Agreement for the first time. *Id.* at 35. Special Agent Cooper also found no evidence of coercion by the Commissioners in reaching the Agreement. *Id.* at 95.

The Report of the Commissioner of Indian Affairs dated September 16, 1893 (Pl. Ex. 10), written before Congress ratified the 1892 Agreement, stated the Indians had "not signified their assent that such reservation

might be embraced within the Territory of Dakota or State of South Dakota[,]" and further,

> Notwithstanding that all the Indians have accepted allotments and land patents have been issued to many of them for their lands, yet their relationship with local State authorities has not changed. The reservation has been within an organized county for many years, yet the county authorities decline to recognize the Indians or any of the residents of the reserve as entitled to the rights and privileges of citizenship. The constitution of the State of South Dakota expressly disclaims any right or title to any lands owned or held by an Indian or Indian tribe and are exempt from taxation, and this is held to disclaim any jurisdiction over the tribe, either civil or criminal, of the residents within an Indian country.
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> It is clear, then, that the United States exercises sole and exclusive jurisdiction over the reservation except in so far as it may see fit to grant the State the right to exercise its jurisdiction.

B. The Language of the 1892 Agreement and the Legislative History of the 1894 Ratifying Act

The entire 1892 Agreement and its preamble were incorporated into the 1894 ratifying statute. (Pl. Ex. 2, hereafter "Act".) Congress stated in the Act that it "accepted, ratified, and confirmed" the 1892 Agreement and:

> [t]hat the lands by said agreement ceded to the United States shall, upon proclamation by the

> President, be *opened to settlement*, and shall be subject to disposal only under the homestead and town-site laws of the United States, excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common school purposes and be subject to the laws of the State of South Dakota[.]

Act at 6 (emphasis added). Congress' statement that the ceded lands shall be "opened to settlement" is ambiguous in that it does not make clear whether the Yankton Sioux Reservation is disestablished or whether the Reservation is diminished only to the extent of the ceded lands. Where there is an ambiguity in a statute, a preamble can be utilized to help discern the intent of Congress. *See Jurgensen v. Fairfax County*, 745 F.2d 868, 885 (4th Cir. 1984). The preamble to the 1892 Agreement cited the 1892 appropriations act authorizing the Secretary of the Interior "to negotiate with any Indians for the *surrender of portions of their respective reservations*, any agreement thus negotiated being subject to subsequent ratification by Congress[.]" Act at 1 (emphasis added). The preamble also recited that the Yankton Sioux Tribe "is willing to *dispose of a portion of the land set apart and reserved to said tribe, by the first article of the treaty of April (19th) nineteenth, eighteen hundred and fifty eight (1858)*, between said tribe and the United States, and situated in the State of South Dakota[.]" Act at 1 (emphasis added). The emphasized portions of the preamble clearly indicate congressional intent to accept the will of the Yankton Sioux Tribe to cede only a portion of the reservation established by the 1858 Treaty. Similarly, in *Solem*, 465 U.S. at 472-74, 104 S.Ct. at 1167-68, the Supreme Court concluded that the

phrase "sell and dispose" indicated congressional intent to maintain existing reservation boundaries of the Cheyenne Reservation in South Dakota. Thus, the language of the 1894 Act of Congress contradicts any suggestion that the Yankton Sioux Reservation is disestablished.

Congress added the provision about reserving the sixteenth and thirty-sixth sections for common school purposes. The Supreme Court interpreted similar language in the Rosebud Acts as intended by Congress to conform them to the enabling legislation which admitted the State of South Dakota into the Union, and reasoned that Congress thereby intended to diminish the Rosebud Reservation. 25 Stat. 679 (1889); *Rosebud Sioux Tribe*, 430 U.S. at 599-601, 97 S.Ct. 1369-70. In *Yankton Sioux Tribe*, the Supreme Court recognized the State's position, relying on *Rosebud*, that the school sections clause indicated a view that Congress meant to extinguish the reservation status of the ceded lands, ___ U.S. at ___, 118 S.Ct. at 801, but, referring to Article VIII, not Article VII, the Supreme Court concluded that " . . . a somewhat contradictory provision counsels against finding the reservation terminated." The Supreme Court cited its earlier conclusion in *DeCoteau* that the school sections clause implied nothing about the presence or absence of state civil and criminal jurisdiction over the remainder of the ceded lands, and the Supreme Court did not consider at all the effect of the school sections clause on the allotted, unceded lands. In *DeCoteau*, where the Lake Traverse Reservation was held to be disestablished, the Supreme Court dismissed the school sections clause in a footnote as irrelevant to the dispute before the Court. *DeCoteau*, 420 U.S. at 444 n.33, 95 S.Ct. at 1093 n.33. The Supreme Court observed that

the clause was not part of the agreement sent to Congress for ratification, there was no indication Congress added the clause with the intent to qualify the terms of the cession agreement, and it was Congress' usual practice to include the clause in "opening public lands to settlement[.]" *Id.*

This Court concludes that the school sections clause is equally irrelevant here, as it was in *DeCoteau*, but even if the clause is deemed relevant, a probable interpretation of it is that Congress wanted to be sure common schools would be available for all residents, Indian and non-Indian, in the opened, assimilated Yankton Sioux Reservation. If Congress had intended to disestablish the Yankton Sioux Reservation, the common school sections would have been subject to state law in any event and such language would have been wholly unnecessary.

Nothing in the explicit language of the 1892 Agreement supports disestablishment of the Reservation. The first two Articles, which were the focus of the previous *Yankton Sioux* cases, ceded to the United States the surplus lands for a sum certain and diminished the size of the Reservation. *Yankton Sioux Tribe*, ___ U.S. ___, 118 S.Ct. at 798. Articles III, IV, and VI pertained to the method of payment to the Tribe of the principal and interest received upon the sale of the surplus lands, and those Articles do not shed any light on the disestablishment issue.

Many of the remaining Articles of the 1892 Agreement also do not further the disestablishment analysis. They provided for gifts of $20 gold pieces to males of the

Tribe, Article VII; permitted leasing of uncultivated allotted land, Article IX; permitted religious societies to continue working among the Indians, Article X; prohibited payment of the land purchase price to the Indians to settle claims prior to the Agreement, Article XII; fixed the status of mixed bloods, Article XIII; prohibited Congress from alienating the allotments from the Indians before sale of the surplus lands to settlers, Article XIV; settled the claims of the Yankton scouts and the Tribe's claim to the Pipestone Reservation, Articles XV and XVI; provided for placement of a copy of the Agreement in the Yanktons' "Agreement Book," Article XIX; and bound both parties upon ratification by Congress, Article XX. Consequently, these Articles will not be discussed in any detail.

1. Article V

Article V provided for the set aside and use of the interest on the land purchase price to continue funding services for the Yanktons' most helpless members, for schools and educational purposes, and "for courts of justice and other local institutions for the benefit of said tribe[.]" The evidentiary record before the Court establishes that, years before the 1892 Agreement, Congress authorized the creation of an Indian police force and a Court of Indian Offenses on the Yankton Sioux Reservation, and that such a police force and a Court of Indian Offenses operated to govern tribal affairs at the time of the ratification. H. Hoover, *Yankton Tribal Police and Court of Indian Offenses, 1859-1943* (1998). (Gov't. Ex. 16.) Article V's provision for continued funding of these and "other local institutions" signals congressional intent consistent

with the continuing reservation status of the allotted lands and an intent to preserve tribal self-government within the 1858 boundaries on the allotted lands.

Section 2 of Article V solidified the understanding of the Yanktons and the Congress, consistent with the Dawes Act, that the Yanktons' land patents would be held in trust for twenty-five years, and at the end of that trust period, the Yanktons would receive from the United States a complete title to their allotted lands, and would then assume all the duties and responsibilities of citizenship. Such language indicates a congressional intent that there would be an ongoing relationship between the Yanktons and the federal government during the twenty-five year assimilation period. Because the Yanktons were not to receive patents in fee immediately, the Yanktons continued to live on land that was essentially retained in reservation status but apportioned to them individually. Such an interpretation is supported by evidence in the record showing that three U.S. Presidents – Woodrow Wilson, Calvin Coolidge, and Herbert Hoover – extended by Executive Order the trust period on certain of the allotted lands, and in each Executive Order, the President explicitly referred to "the trust period on the allotments of Indians *on the Yankton Sioux Reservation*[.]" (Gov't. Exs. 10-12.)

Acts of Congress subsequent to the 1894 Act, such as the Burke Act of 1906, facilitated the alienation of a substantial number of Indian allotments to non-Indians by 1913, through such means as allowing the Secretary of the Interior to grant patents in fee to certain "competent" Indians prior to the expiration of the trust period and through sales of heirship lands. (Pl. Exs. 21-22; Pl. Ex. 2,

1892 Agreement, Article XI.) These sales of allotments were not always the result of arms-length negotiation. The allegations of a 1921 complaint brought by the United States on its own behalf and as guardian of certain Yankton Indians and their heirs indicates that the federal government viewed the Yankton Reservation as still in existence and gives insight into the federal government's concerns about the means by which sales of allotments were obtained. *United States v. Caster*, 271 F. 615 (8th Cir.), *appeal dismissed*, 257 U.S. 666 (1921).

The United States brought the action for the purpose of obtaining a decree adjudging the United States to be the owner of the allotted lands at issue, subject to the rights of the allottees, and for the cancellation of all conveyances of the lands made by the Indian allottees to the non-Indian defendants. *Id.* at 616. The lands in question had been allotted under section 5 of the Dawes Act of 1887, to be held in trust for twenty-five years. *Id.* On April 20, 1916, the President of the United States by Executive Order extended the trust period for ten more years as to the allotted lands at issue. *Id.*

The complaint alleged that, to assist the Secretary of the Interior in exercising his authority under the Burke Act of 1906, the Secretary appointed a three person commission, which included "A.W. Leech, Superintendent of the Yankton Reservation," and directed the commission to investigate the competency and capability of the "Indian allottees residing on the Yankton Reservation to manage and control their property." *Id.* After investigation, the commission submitted reports to the Secretary representing that a number of Indians, including the allottees at issue, were competent to manage and control

their own affairs and recommending that the Secretary issue to them patents in fee for their allotments. *Id.* In reliance on the reports, the Secretary prepared the patents in fee, the President signed them, as did the Recorder of the United States General Land Office, and they were recorded in the appropriate books in the General Land Office. *Id.*

The complaint further alleged that the Secretary of the Interior decided to deliver the patents in fee in person. Upon his arrival in Greenwood, South Dakota, on May 12, 1916, the Secretary

> learned that he had been grossly misled as to the competency of such allottees; that they were palpably incompetent to manage and control their respective properties and were not qualified to receive patents in fee; that, while such allottees had been represented to him as competent, some of them were wholly untutored, and each and all of them were without business experience, were incapable of protecting his or her property, or of appreciating its true value, and were easily imposed upon by the craft and design of their more astute white neighbors; and that certain of them . . . before the execution of their respective fee patents in some cases and after such execution in others, but before the time for the delivery of the patents, had been unlawfully, secretly, and surreptitiously imposed upon by white men, and had entered into secret and unlawful agreements for the sale and disposition of their several allotments and had otherwise been duped and defrauded in relation thereto.

Id. at 617. The Secretary of the Interior refused to deliver the patents in fee, took them back to Washington, and ordered them to be marked, " 'Canceled.' " *Id.* The complaint alleged that the commissioners had likewise been misled in their investigation. *Id.*

Relying upon *United States v. Schurz*, 102 U.S. 378, 26 L.Ed. 167 (1880), the Eighth Circuit held that the title of the United States to the lands in controversy was divested at the time of the execution and recording of the patents in fee, that delivery of the patents by the Secretary to the allottees was not necessary to transfer title, and that the title remained in the allottees, notwithstanding the Secretary's attempt to cancel the patents in fee. *Id.* at 619. The court ultimately held that the complaint failed to allege a cause of action because there was no claim of a mistake of law, but only a mistake of fact, and the allegations of fraud were too general because the complaint did not identify who made the misrepresentations to the commissioners and what the misrepresentations were. *Id.* at 620. The record in this case reflects that similar practices occurred through the 1920's such that Indian land holdings drastically declined until Congress passed the Indian Reorganization Act in 1934. 48 Stat. 984, codified as amended at 25 U.S.C. § 461 *et seq.*

As mentioned earlier in this opinion, however, the actions of Congresses after the 1894 Act, which allowed the sales of Indian allotments before the trust period ended, "form a hazardous basis for inferring the intent of an earlier [Congress]." *Yankton Sioux Tribe*, ___ U.S. ___, 118 S.Ct. at 803. Congressional intent not to disestablish the Yankton Sioux Reservation is clear from the 1894 Act,

the 1892 Agreement and the surrounding contemporaneous historical circumstances. The acts of Congress in later years cannot be bootstrapped to the 1894 Act to determine the intent of the 53rd Congress when it ratified the 1892 Agreement.

Even if miscellaneous, subsequent legislation is relevant to show the ultimate consequences of the allotment policy initiated by the Dawes Act, no party or amicus curiae to this consolidated litigation has identified a specific, subsequent act of Congress that expressly and unequivocally disestablished the Yankton Sioux Reservation. By 1934, Congress recognized the utter failure of its allotment policy and the role it played in forcing the Indian tribes into greater poverty and social destruction. That year, Congress passed the Indian Reorganization Act, which again placed primary focus upon reservations in Indian land policy, permitted the exchange of lands held by Indians and non-Indians within reservations in an effort to consolidate tribal lands, and extended indefinitely the trust period on allotted lands.

Since the 1894 Act, Congress has continued to refer to the Yankton Sioux Reservation as a continuing entity, even though the record is replete with contradictory references by federal, state, and county officials and citizens. *See* 41 Stat. 1468 (1920) (authorizing Secretary of Interior to convey to trustees of Yankton Agency Presbyterian Church, by patent in fee, premises situated *within the Yankton Indian Reservation*, county of Charles Mix, State of South Dakota); 47 Stat. 300 (1932) (dividing the United States District Court for the District of South Dakota into four divisions, and providing that "[t]he territory embraced . . . in the counties of Aurora, Beadle, . . .

Charles Mix, . . . Yankton, and *in the Yankton Indian Reservation*, shall constitute the southern division of said district."); Reclamation Projects Authorization and Adjustment Act of 1992, Pub.L. No. 102-575 2005(b) (1992) (approving water project to "irrigate not more than approximately three thousand acres of *Indian-owned land in the Yankton-Sioux Indian Reservation* . . . "). These statutory references, if relevant to the disestablishment question at all, certainly must be construed in favor of the Yankton Sioux Tribe. As the Supreme Court recognized, "the allotment era has long since ended, and its guiding philosophy has been repudiated. Tribal communities struggled but endured, preserved their cultural roots, and remained, for the most part, near their historic lands." *Yankton Sioux Tribe*, ___ U.S. ___, 118 S.Ct. at 805. Repeated congressional recognition in statute of an existing Yankton Sioux Reservation compels this Court to do nothing other than effectuate the "present-day understanding of a 'government-to-government relationship between the United States and [the Yankton Sioux Tribe][.]' " *Id.*

2. Article VIII

The Supreme Court characterized Article VIII of the 1892 Agreement, erroneously denominated Article VII in its opinion, as a provision that "counsels against finding the reservation terminated." *Yankton Sioux Tribe*, ___ U.S. ___, 118 S.Ct. at 801. Article VIII reserved from sale those surplus lands "as may now be occupied by the United States for agency, schools, and other purposes" until "they are no longer required for such purposes." Act at 3.

The Supreme Court observed that in *Solem* it had said "with respect to virtually identical language" that " '[i]t is difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened area would remain part of the reservation.' " *Id.* (quoting *Solem*, 465 U.S. at 474, 104 S.Ct. at 1168).[6] The Supreme Court provided no further analysis of this Article VIII issue, but immediately proceeded to discuss a different Article of the Agreement. Article VIII must nonetheless have continued to trouble the court, for in closing the opinion, it identified "[t]he conflicting understandings about the status of the reservation, together with the fact that the Tribe continues to own land in common," that cautioned it to limit its holding to the narrow issue of diminishment. *Id.* at 805. The court said it "need not determine whether Congress disestablished the reservation altogether in order to resolve this case, and accordingly [we] decline to do so. Our holding in *Hagen* was similarly limited, as was the State Supreme Court's

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[6] Article VIII also provided that, upon ratification, all ceded lands would be offered for sale through the proper land office, "to be disposed of under the existing land laws of the United States, to actual and bona fida settlers only." It is interesting to note that an Armour, South Dakota, bank official, Homer Johnson, wrote to the Secretary of the Interior in 1895, shortly before the Presidential Proclamation opening the lands to settlement, complaining that the State of South Dakota was attempting to file claim to certain of the surplus lands in violation of Article VIII's provision that all claims were to be disposed of under the land laws of the United States. Johnson reported that the South Dakota Constitution forbade the sale of state land for less than $10.00 per acre, and if the State were allowed to file claim, the lands would be unavailable to settlers indefinitely. (Pl. Ex. 56.)

description of the Yankton reservation in . . . *State v. Greger*, 559 N.W.2d [854,] 867 [(SD 1997)]."[7] *Id.*

The Supreme Court's reference to "common ownership" by the Tribe must have referred to the Tribe's recent purchases of lands within the 1858 exterior boundaries that had at some earlier time passed from Indian allotment to non-Indian ownership. The Supreme Court would clearly have understood that it is not correct to refer to an Indian Tribe as "owning" reservation land in common because the right of Indians to their reservations was a right of use and occupancy, with the United States holding title in fee. *Spalding v. Chandler*, 160 U.S. 394, 16 S.Ct. 360, 40 L.Ed. 469 (1896). The right to use and occupancy was as sacred as the fee title of the sovereign. *United States v. Cook*, 86 U.S. 591, 22 L.Ed. 210, 19 Wall. 591 (1873).

Other than the allotments reserved to the Yanktons and held in trust for twenty-five years pending patent in fee, the Yanktons did not themselves reserve in the 1892 Agreement any lands to be held in common by the Tribe,

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[7] The question of the existence of the Yankton Sioux Reservation has been presented to the South Dakota Supreme Court four times, but it appears that the issue was not fully presented by evidence until *Greger*, when the parties stipulated to incorporate the record that was before this Court in *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, CIV 94-4217. *Greger*, 559 N.W.2d at 859 n.5. As the Supreme Court noted, the South Dakota Supreme Court held in *Greger* that the Yankton Sioux Reservation is diminished to the extent of the ceded lands, as it did in *State v. Thompson*, 355 N.W.2d 349 (S.D. 1984) (using term "disestablished"); *State v. Williamson*, 211 N.W.2d 182 (S.D. 1973) (same); and *Wood v. Jameson*, 130 N.W.2d 95 (S.D. 1964) (same).

but agreed that the United States would reserve from sale to settlers some of the ceded lands to be used for agency, school and other purposes to benefit the Tribe. The reservation of lands by the United States for the benefit of the Tribe was virtually equivalent, under the law, to reservation for the use and occupancy of the Tribe.

Following ratification of the 1892 Agreement, the United States reserved 1,252.89 acres for agency, church, and school purposes pursuant to Article VIII of the Agreement.[8] (Pl. Ex. 11.) As noted by the Supreme Court, there is some acreage within the original 1858 boundaries that has reverted to commonly held tribal or trust land. *Yankton Sioux Tribe*, ___ U.S. ___, 118 S.Ct. at 804. In the late 1920's, the United States returned to the control of the Yankton Sioux Tribe some of the lands reserved in the 1892 Agreement for school purposes because they were no longer needed. (Gov't. Ex. 13.) That land, as well as other parcels the Tribe has purchased in recent years are controlled by the Tribe in common. The record reflects that the Tribe recently has applied to the Secretary of the Interior to take into trust certain lands purchased by the Tribe within the original 1858 exterior boundaries, and that the proceeds of the Fort Randall Casino owned and operated by the Tribe will facilitate the purchase of additional lands by the Tribe in the future. This evidence of

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[8] When the Commissioner of Indian Affairs wrote his instructions to the Yankton Commission on July 27, 1892, 852 acres had been reserved for government purposes. Instructions to the Yankton Indian Commission (reprinted in U.S. Supreme Court Joint Appendix at 99.)

tribal control of lands within the 1858 boundaries confirms what the Supreme Court suspected: Article VIII counsels against finding the reservation terminated.

3. Articles XVII and XVIII

Finally, two other Articles of the 1892 Agreement, Article XVII, the liquor provision, and Article XVIII, the savings clause, merit discussion as supporting the conclusion that a diminished reservation remained intact. Article XVII provided (emphasis added):

> No intoxicating liquors nor other intoxicants *shall ever* be sold or given away upon any of the lands by this agreement ceded and sold to the United States, *nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the treaty between the said Indians and the United States, dated April 19th, 1858,* and as afterwards surveyed and set off to the said Indians. The penalty for the violation of this provision shall be such as Congress may prescribe in the act ratifying this agreement.

In the 1894 Act, Congress set the penalty for violation of Article XVII, which it ratified as written, at imprisonment for not more than two years and a fine of not more than $300. Act at 7. The Supreme Court agreed with the State that the most reasonable inference from the inclusion of this provision was that Congress was aware the opened, unallotted areas would, in the future, not be "Indian Country," and from this, the Supreme Court discerned an intent to diminish the reservation to the extent of the ceded lands. *Yankton Sioux Tribe,* ___ U.S. ___, 118 S.Ct. at 801. Furthermore, the court said, the Commissioner of

Indian Affairs described the provision as prohibiting " 'the sale or disposition of intoxicants upon any of the lands *now* within the Yankton Reservation,' . . . indicating that the lands *would be severed from the reservation* upon ratification of the agreement." *Id.* (emphasis added). The court reaffirmed its prior implication of diminishment, but not disestablishment, of the Yankton Sioux Reservation in *Perrin v. United States*, 232 U.S. 478, 34 S.Ct. 387, 58 L.Ed. 691 (1914), when it said in *Yankton Sioux Tribe* that Article XVII applied to ceded lands formerly included in the Yankton Sioux Reservation. *Id.* Thus, the Supreme Court itself noted a jurisdictional distinction between the ceded lands, which were severed from the reservation, and the allotted lands, which remained in reservation status.

The inclusion of Article XVII in the 1892 Agreement supports the view that the reservation was not disestablished. Congress outlawed the sale of intoxicating liquor in Indian Country on July 23, 1892. 27 Stat. 260. The Yankton Commissioners conducted the negotiations with the Yankton Sioux for the sale of surplus lands shortly thereafter in the fall of 1892, and there is no indication in the Commissioners' reports that either party was aware of the liquor statute when the Agreement was reached. The liquor provision was included in the list of propositions presented by the Tribe, and Article XVII as drafted and ratified prohibited liquor forever upon the ceded lands *and* upon "any other lands within or comprising the reservations of the Yankton Sioux." Had Congress intended to disestablish the reservation, Congress would have wanted to make clear that the 1892 liquor law did not apply to the Indian allotments or the ceded lands, as

neither would remain "Indian Country" if the reservation were disestablished. Congress instead ratified Article XVII, and by approving the Article, evidenced its intent to preserve the reservation status of the allotted lands.

In 1916, the Eighth Circuit considered an appeal from a federal criminal conviction for the sale of intoxicating liquor on the lands *ceded* by the 1894 Act. *Cihak v. United States*, 232 F. 551 (8th Cir. 1916). The appeals court cited Article XVII of the 1892 Agreement as the basis for the federal prosecution, noting that the defendant "was indicted, tried, convicted, and sentenced for selling intoxicating liquors *upon the portion of this reservation ceded to the United States*." *Id.* at 552 (emphasis added). The court reversed for a new trial only because of evidentiary error. *Id.* at 554-55. Thus, even in 1916, the Eighth Circuit recognized that the Yankton Sioux Reservation existed and that only a portion of it had been ceded. After 1894, there was not an act of Congress that changed the reservation status of the allotted lands, and state or private conduct directed to the lands in question is not sufficient to cause such a change. *See Seymour*, 368 U.S. at 354, 82 S.Ct. at 426.

Article XVIII, the savings clause, was the fulcrum of the previous *Yankton Sioux Tribe* litigation. Despite the fact that the first sentence of Article XVIII expressly stated the non-abrogation of the 1858 Treaty and the second sentence recognized the continuing "full force and effect" of the 1858 Treaty, the Supreme Court rejected the view of this Court and the Eighth Circuit that the savings clause existed for any other reason than to assure the Yanktons that they would continue to receive their annuities under the 1858 Treaty. *Yankton Sioux Tribe*, ___ U.S.

___, 118 S.Ct. at 800. The Supreme Court also ruled, in rejecting an argument of the United States, that it was not persuaded to "view the savings clause *as an agreement to maintain exclusive tribal governance within the original reservation boundaries.*" *Id.* at 800 (emphasis added). Having reached the conclusion that Articles I and II of the Agreement were precisely suited to terminating reservation status of the ceded lands, it makes sense that the Supreme Court would not interpret the savings clause as an agreement to maintain the Tribe's *exclusive* tribal governance *over the ceded lands*. The court did not comment at all upon whether it would interpret the savings clause as an agreement to maintain tribal governance over the allotted lands within the original reservation boundaries. This Court concludes that the savings clause, even if limited only to the matter of preserving the Tribe's annuities under the 1858 Treaty, creates an inference that Congress contemplated that the Tribe would continue as a political entity even after the ratification of the 1892 Agreement, that its members would continue to receive the annuity benefits promised them for fifty years under the 1858 Treaty, and that tribal self-governance during the trust period was consistent with the continuation of reservation status of the allotted lands.

4. The Legislative History

Much of the legislative history of the 1894 Act already has been discussed. S. Exec. Doc. No. 27, 53rd Cong., 2d Sess. at 26 (1894); (Pl. Ex. 5.) (hereafter "Legislative History"). The letters of Secretary of the Interior Hoke Smith and Acting Commissioner of Indian Affairs

Frank C. Armstrong transmitting the Agreement to Congress contain no indications that the Agreement expressly disestablished the reservation or that they had any reason to believe that disestablishment would occur. To the contrary, Acting Commissioner Armstrong flatly told Congress that the "treaty makes no provision regarding the cession or relinquishment of the reservation or any portion thereof." Legislative History at 5. Thus, Congress knew, both from Armstrong's statement and from the extensive reports of the Yankton Commissioners, that the Yanktons had not expressly consented to the relinquishment of their entire reservation, and as already shown, Congress accepted and ratified that position in the 1894 Act.

Without doubt, parts of the legislative history suggest that Congress believed the allotment of land in severalty to individual Indians would curtail "[o]ne of the greatest hindrances to the progress of these people[, which] has been their tribal mode of life and ownership of land in common, and the issue of food and clothing [given] to them by the Government." By providing "each member of the tribe a home in his own right[,]" and bringing in the "frugal, moral, and industrious" white settlers to work beside the Indians, Congress hoped to "stimulate individual effort and make their progress much more rapid than before." (Pl. Ex. 7, State Ex. 608.) Such sentiments echo the resolution of Senator Dawes and the Forty-Ninth Congress of 1887 to assimilate the Yanktons into white culture, but these comments are passing references, and they do not overcome the strong textual and contemporaneous evidence set out in this

opinion establishing that the Yanktons' allotted lands retained reservation status.

III. Treatment of the Yankton Sioux Reservation after 1894

In *Yankton Sioux Tribe*, the Supreme Court, recognizing that the 1894 Act was "not so compelling that, standing alone, it would indicate diminishment," turned to subsequent congressional and administrative references to the reservation and demographic trends to support its conclusion that de facto diminishment had occurred. *Yankton Sioux Tribe*, ___ U.S. ___, 118 S.Ct. at 802-05. Even then, the court observed that the conflicting evidence was of limited interpretative value. *Id.*, ___ U.S. ___, 118 S.Ct. at 804. In the *DeCoteau* disestablishment decision, the Supreme Court devoted only two paragraphs to mention of the jurisdictional history subsequent to the 1891 surplus land act, and focused its analysis entirely upon deciding whether a congressional intent to terminate the reservation was expressed on the face of the 1891 Act or was clear from the surrounding circumstances and legislative history. *DeCoteau*, 420 U.S. at 442-43, 95 S.Ct. at 1092. The *DeCoteau* approach is the one the Court has taken in this opinion, because *DeCoteau* does not place any emphasis on "de facto disestablishment," if there is such a thing, in a manner similar to the Supreme Court's diminishment cases.

The complete evidentiary record now before the Court contains scores of historical documents, cases, deeds, affidavits, and testimony from which no clear

picture emerges as to a consistent treatment of the Yankton Sioux Reservation following passage of the 1894 Act. From the time of the Proclamation of President Grover Cleveland in 1895 opening the ceded lands of the Yankton Sioux Reservation for white settlement until today, the question of jurisdiction has presented a complicated puzzle, and the hope of many that the Supreme Court's decision would solve the puzzle once and for all did not come to fruition.

The evidence before the Court shows that, at various times, and for different reasons, some political, some fiscal, and some racial, the Yankton Sioux Tribe, the United States, the State of South Dakota, Charles Mix County, and the amicus curiae municipalities have exercised jurisdiction within the original exterior boundaries of the reservation. Much of this evidence was reviewed in the Court's previous opinion in *Yankton Sioux Tribe*, 890 F.Supp. at 887-88, but more evidence was admitted in this phase of the litigation. Each political entity points to the evidence establishing its exercise of jurisdiction to support its view as to whether the reservation is disestablished or not.

Thus, the Tribe emphasizes evidence that it has in the past and today maintains a tribal police force and tribal courts, that the Tribe governs itself through a Tribal Code, and that the Yankton Sioux Constitution, as amended in 1990, claims tribal jurisdiction extending to the original exterior 1858 boundaries. (Gov't. Exs. 1-2.) The State points to its law enforcement presence, the criminal and civil cases prosecuted in its courts, its exercise of jurisdiction over environmental matters, and the maps and various references indicating a former Yankton Sioux

Reservation. Charles Mix County and the cities remind the Court of their vested interest in the lands at issue and their exercise of criminal and civil jurisdiction, including taxation. They point out that the Charles Mix county seat, as well as law enforcement and court facilities, lie on former allotted lands. They emphasize the justifiable expectations of the people living in Charles Mix County. The United States, like the State, highlights its law enforcement presence on the reservation immediately after the ratification of the 1892 Agreement and its long-standing involvement in the affairs of the Tribe.

The fact that any one of these political entities has exercised or continues to exercise any form of jurisdiction within the original exterior boundaries of the Yankton Sioux Reservation is only minimally helpful to the Court in determining whether such exercise of jurisdiction was or is proper under the law. In this opinion, the Court has reached a legal conclusion, based upon the 1892 Agreement, the text of the 1894 Act, its legislative history, and the circumstances surrounding the negotiations for the sale of surplus lands, that the reservation is not disestablished.

IV. The *DeCoteau* Result Does Not Control This Case

It is important to explain why the Court believes that the *DeCoteau* result does not control the outcome in this case. The most obvious reason is that, had *DeCoteau* controlled this case, the Supreme Court would have applied it to grant the State the relief it sought: disestablishment of the Yankton Sioux Reservation. The Supreme Court did not do so and instead signaled some concern about

whether the reservation continued to exist. Throughout its opinion, the Supreme Court agreed with the broad concepts expressed in *DeCoteau*, but ultimately applied them to terminate only the reservation status of the Yanktons' ceded lands. *Yankton Sioux Tribe*, ___ U.S. at ___, 118 S.Ct. at 801.

DeCoteau is factually distinguishable from the case before the Court. In reviewing the historical context that led to the sale of all of the surplus lands in the Lake Traverse Reservation, the Supreme Court emphasized that very early on, the spokesman for the Sisseton-Wahpeton Sioux Tribe stated in the local press that "[w]e never thought to keep this reservation for our lifetime. . . . The Indians have taken their land in severalty. They are waiting for patents. The Indians are anxious to get patents. We are willing the surplus land should be sold. We don't expect to keep reservation. . . . When the reservation is open we meet as one body. We be as one." *DeCoteau*, 420 U.S. at 433, 95 S.Ct. at 1087.

The negotiations between the Commissioners and the Sisseton-Wahpeton Tribe for the sale of the surplus lands took two weeks and the *DeCoteau* opinion does not mention any disagreement that occurred among the members of the Tribe in deciding to sell their lands or any opposition registered to the agreement at all. The Indians wished to sell outright all of their surplus lands on three conditions: that each tribal member, regardless of age or sex, receive an allotment of 160 acres, that Congress settle their loyal scout claim, and that an adequate sales price per acre be paid for all of the unallotted land. *Id.*, 420 U.S. at 434, 95 S.Ct. at 1088. The agreement departed from the strict provisions of the Dawes Act because it gave the

Indians a large number of allotments, each member of the Tribe receiving 160 acres regardless of age or sex, as requested by the Tribe. This approach provided the Sissetons with far more allotted land per capita than the Yanktons, for whom only heads of families received 160 acres pursuant to the Dawes Act. *Id.* 420 U.S. at 434 n.16, 95 S.Ct. at 1088 n.16.

The Sissetons declined to reserve other portions of the reservation for future allotments and tracts then occupied by the government for agency, school, and missionary purposes because they knew some of the principal and interest from the sale of surplus lands would be used for such purposes, and they did not think it would be proper for them to also reserve a large quantity of land for such purposes. *Id.* The Sissetons stated during negotiations that they did not care to have an agency after the surplus lands were sold, and "[t]his little reservation is ours, and all we have left. There is nothing in our treaty that says that we must sell. It was given us as a permanent home, but now we have decided to sell[.]" *Id.* Thus, the Sissetons expressed their understanding that they would not retain a reservation after the sale of the surplus lands.

The Sisseton and Yankton Agreements are dissimilar in significant ways. In the Sissetons' agreement, there were no counterparts to Articles V, VIII, XI, XVII, and XVIII found in the Yanktons' Agreement.

The legislative history of the Sissetons' agreement shows that Congress had a much different understanding about the future of the Lake Traverse Reservation upon ratification of that agreement than it had regarding the

Yankton Sioux Reservation. The report of the Senate Committee on Indian Affairs recognized that each Sisseton would receive 160 acres, a departure from the allotment act, but nonetheless recommended ratification in light of the fact "that the additional allotments are *in lieu of any residue* which, under their title, these Indians could have reserved for the future benefit of their families, and the further fact that they are soon to assume the responsibilities of citizenship[.]" *Id.*, 420 U.S. at 438-39 n.19, 95 S.Ct. at 1089-90 n.19 (emphasis added). The report further explained that the reservation contained 918,780 acres, 127,887 of which had been allotted to the Indians under the Dawes Act. The additional allotments allowed by Article 4 of the agreement required 112,113 more acres, for a total of 240,002 in allotments "which [left] a surplus, *including the lands occupied by the agency and missionary societies,* of 678,778 acres, *the Indian title to which [was] extinguished by the terms of the agreement. Id.* (emphasis added).

Such an explicit statement of congressional intent to extinguish Indian title to reservation lands cannot be found in the legislative history of the Yanktons' agreement. Moreover, the Sissetons relinquished far more acreage for settlement by non-Indians than they retained for themselves, as compared to the Yanktons who, overall, retained greater acreage for their allotments than they ceded for sale as surplus lands. Congress must have known, when it ratified the Sissetons' agreement in 1891, that the opened area would be settled by more non-Indians than Indians and that truly, the Indian character of the area would be forever changed. Three years later,

when Congress ratified the Yanktons' Agreement reserving a larger portion of the reservation for the Indians' allotments, and reserving land for agency, school, and religious purposes, Congress must have known that the introduction of white settlers would change the Indian character of the Yankton Sioux Reservation to a degree, but not so dramatically as the Lake Traverse Reservation.

As the Eighth Circuit observed in its prior opinion, *DeCoteau* established that only 3,000 of 33,000 people, or nine percent, living within the original exterior boundaries of the Lake Traverse Reservation at the time *DeCoteau* was decided were Indians, while using the lower of two conflicting population figures in this record, thirty-two percent of the population within the original exterior boundaries of the Yankton Sioux Reservation is Indian. *Yankton Sioux Tribe*, 99 F.3d at 1457 & n.26. The recent evidence introduced into the record shows that the population of Indians living on and adjacent to the Yankton Sioux Reservation has increased during the 1990's. (Gov't. Exs. 5a-c.) Moreover, the Bureau of Indian Affairs Superintendent at the Yankton Agency, Timothy Lake, testified that, in addition to the Indian students who attend the Marty Indian School, 176 Indian students attend the Lake Andes public elementary school as compared with 72 white students, and 225 Indian students attend the Wagner public elementary school as compared to 227 white students.

In *DeCoteau*, the Supreme Court emphasized that the Sisseton-Wahpeton Sioux Tribe did not establish a tribal court or legal code to exercise the jurisdiction which the Tribe claimed in a 1966 tribal constitution to extend to lands lying within the original reservation boundaries.

The evidence in this case shows a tribal court operated before and after the 1894 Act and that the Yankton Sioux Tribe has adopted a legal code to exercise the jurisdiction it claims to govern its own people within the original 1858 exterior boundaries.

Under the facts presented in *DeCoteau*, it is understandable that the Supreme Court held the reservation was disestablished by the 1891 Act because that was the precise understanding held by the Sisseton-Wahpeton Tribe itself. In light of the far different facts presented by the Yankton Agreement, it is clear why the Supreme Court did not apply *DeCoteau* to hold the Yankton Sioux Reservation disestablished. In this opinion, this Court has exhaustively enumerated many reasons, based upon the strong textual and contemporaneous evidence, why the Yankton Sioux Reservation was not disestablished, and certainly, this Court will not apply the *DeCoteau* result to hold that the Yankton Sioux Reservation is disestablished.

V. Conclusion

The result of the Supreme Court's diminishment decision and this Court's determination in this opinion that the Yankton Sioux Reservation is not disestablished is a checkerboard pattern of jurisdiction on the reservation. The Court's decision, however, produces a stable, unchanging allocation of jurisdiction. *See Ute Indian Tribe*, 114 F.3d at 1530. The Yankton Sioux Tribe and the federal government exercise primary criminal and civil jurisdiction in "Indian Country," that is, the lands within the original exterior 1858 Treaty boundaries that are or were Indian allotments or lands reserved for agency purposes,

even though some of those lands may now have passed into fee status. *See Alaska v. Native Village of Venetie Tribal Gov't*, ___ U.S. ___, 118 S.Ct. 948, 952 & n.1, 140 L.Ed.2d 30 (1998); *DeCoteau*, 420 U.S. at 427 n.2, 95 S.Ct. at 1084 n.2. "Indian Country" also includes rights-of-way running through the allotted and reserved areas which constitute the diminished reservation. 18 U.S.C. § 1151(a); *DeCoteau*, 420 U.S. at 427 n.2, 95 S.Ct. at 1084 n.2. Even in "Indian Country," the State may have jurisdiction over some persons or types of conduct, but such jurisdiction is quite limited. *See DeCoteau*, 420 U.S. at 427 n.2, 95 S.Ct. at 1084 n.2 (and cases cited therein). As stated in *Yankton Sioux Tribe*, ___ U.S. at ___, 118 S.Ct. at 797-98, state and local governments exercise primary criminal and civil jurisdiction over the ceded lands opened to settlement on the Yankton Sioux Reservation as a result of the 1894 Act of Congress. Although some title searches may be necessary to determine conclusively which lands were ceded under the 1894 Act, once the status of the lands is determined, the allocation of jurisdiction can be determined and jurisdiction likely will not change in the future as lands are bought and sold. *See Ute Indian Tribe*, 114 F.3d at 1530. Lands purchased by the Tribe and taken into trust by the federal government pursuant to 25 U.S.C. § 465, however, even if such lands lie within the ceded areas of the reservation, are subject to tribal and federal jurisdiction. *See Cass County*, ___ U.S. ___, 118 S.Ct. at 1910.

With the interests of all parties carefully in mind, the Court reaches the decision warranted by law. It is incumbent upon the Yankton Sioux Tribe, the United States, the State of South Dakota, Charles Mix County, and the affected municipalities, as well as each individual who

resides within the affected area, to foster a spirit of communication, cooperation, and compromise in order to accommodate, as far as possible, each of the legitimate governmental, economic, social, political, and legal interests that are at stake. For all of the reasons stated,

IT IS ORDERED:

(1) that, in *Yankton Sioux Tribe v. Gaffey*, CIV 98-4042, the Court enters a declaratory judgment in favor of the plaintiffs Yankton Sioux Tribe and its individual members and in favor of the plaintiff-intervenor United States of America and against the defendants Matt Gaffey, Herman Peters, Bruce Bakken, Jack Soulek, William Janklow, and Mark Barnett holding that the 53rd Congress did not disestablish the Yankton Sioux Reservation in 1894 when it ratified the 1892 Agreement with the Yankton Sioux Tribe for the sale of surplus lands.

(2) that, in *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, CIV 94-4217, the Court enters a declaratory judgment in favor of the plaintiffs Yankton Sioux Tribe and Darrell Drapeau individually, and against the third-party defendant, State of South Dakota, holding that the 53rd Congress did not disestablish the Yankton Sioux Reservation in 1894 when it ratified the 1892 Agreement with the Yankton Sioux Tribe for the sale of surplus lands.

(3) that, in *Yankton Sioux Tribe v. Gaffey*, CIV 98-4042, the Court dismisses with prejudice the counterclaims of the state defendants, William Janklow and Mark Barnett, and the county defendants, Matt Gaffey, Herman Peters, Bruce Bakken, and Jack Soulek against the plaintiffs

Yankton Sioux Tribe and its individual members and the plaintiff-intervenor United States.

(4) that the Yankton Sioux Reservation, diminished by the 1894 Act only to the extent of the ceded lands, includes all of the lands within the original exterior reservation boundaries established by the 1858 Treaty with the Yankton Sioux Tribe that were later allotted to the Yanktons, as well as the lands reserved from sale for agency, school, and other tribal purposes in the 1892 Agreement.

(5) that the Yankton Sioux Reservation, as described in the preceding paragraph, is "Indian Country" within the meaning of 18 U.S.C. § 1151(a).

(6) that the Court enters a permanent injunction in favor of the Yankton Sioux Tribe, its individual members, and the United States enjoining William Janklow and Mark Barnett, in their official capacities as Governor and Attorney General of the State of South Dakota, and their officers, agents, servants, employees, attorneys, and all other persons in active concert or participation with them, from exercising criminal law enforcement jurisdiction over members of the Yankton Sioux Tribe who are alleged to have committed crimes on allotted or reserved lands, notwithstanding any patent, and including rights-of-way running through the Yankton Sioux Reservation as described in paragraph 4.

(7) that the Court enters a permanent injunction in favor of the Yankton Sioux Tribe, its individual members, and the United States enjoining Matt Gaffey, States Attorney of Charles Mix County, and Herman Peters, Bruce Bakken, and Jack Soulek, members of the

Charles Mix County Commission, in their official capacities, and their officers, agents, servants, employees, attorneys, and all other persons in active concert or participation with them, from exercising criminal law enforcement jurisdiction over members of the Yankton Sioux Tribe who are alleged to have committed crimes on allotted or reserved lands, notwithstanding any patent, and including rights-of-way running through the Yankton Sioux Reservation as described in paragraph 4.

(8) that all parties will bear their own attorney's fees and costs.

Dated this 14th day of August, 1998.

BY THE COURT:

/s/ Lawrence L. Piersol
Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: /s/ Linda M. Ziegler
(SEAL) DEPUTY

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-3893/3894/3896/3900SDSF

Yankton Sioux Tribe, and its individual members;	*	Order Denying
	*	Petition for
	*	Rehearing and
Appellee,	*	for Rehearing En
United States of America, on its own behalf and for the benefit of Yankton Sioux Tribe,	*	Banc
	*	
	*	
Appellee,	*	
	*	
v.	*	
	*	
Matt Gaffey, William Janklow, State of South Dakota, and Southern Missouri Waste, et al,	*	
	*	
	*	
Appellants.	*	

The petitions for rehearing en banc are denied. Judge Beam and Judge Loken would grant the petitions and Chief Judge Wollman would grant the petitions for rehearing en banc filed by the State of South Dakota, the Southern Waste Management District, and Charles Mix County.

The petitions for rehearing by the panel are also denied.

(5128-010199)

December 8, 1999

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

TREATY WITH THE YANKTON SIOUX, 1858

Articles of agreement and convention made and concluded at the city of Washington, this nineteenth day of April, A.D. one thousand eight hundred and fifty-eight, by Charles E. Mix, commissioner on the part of the United States, and the following-named chiefs and delegates of the Yancton tribe of Sioux or Dacotah Indians, viz:

Pa-la-ne-a-pa-pe, the man that was struck by the Ree.
Ma-to-sa-be-che-a, the smutty bear.
Charles F. Picotte, Eta-ke-cha.
Ta-ton-ka-wete-co, the crazy bull.
Pse-cha-wa-kea, the jumping thunder.
Ma-ra-ha-ton, the iron horn.
Mombe-kah-pah, one that knocks down two.
Ta-ton-ka-e-yah-ka, the fast bull.
A-ha-ka-ma-ne, the walking elk.
A-ha-ka-na-zhe, the standing elk.
A-ha-ka-ho-che-cha, the elk with a bad voice.
Cha-ton-wo-ka-pa, the grabbing hawk.
E-ha-we-cha-sha, the owl man.
Pla-son-wa-kan-na-ge, the white medicine cow that stands.
Ma-ga-scha-che-ka, the little white swan.
Oke-che-la-wash-ta, the pretty boy.

(The three last names signed by their duly-authorized agent and representative, Charles F. Picotte,) they being thereto duly authorized and empowered by said tribe of Indians.

ARTICLE 1.

The said chiefs and delegates of said tribe of Indians do hereby cede and relinquish to the United States all the lands now owned, possessed, or claimed by them, wherever situated, except four hundred thousand acres thereof, situated and described as follows, to wit – Beginning at the mouth of the Naw-izi-wa-koo-pah or Chouteau River and extending up the Missouri River thirty miles; thence due north to a point; thence easterly to a point on the said Chouteau River; thence down said river to the place of beginning, so as to include the said quantity of four hundred thousand acres. They, also, hereby relinquish and abandon all claims and complaints about or growing out of any and all treaties heretofore made by them or other Indians, except their annuity rights under the treaty of Laramie, of September 17, A.D. 1851.

ARTICLE 2.

The land so ceded and relinquished by the said chiefs and delegates of the said tribe of Yanctons is and shall be known and described as follows, to wit –

"Beginning at the mouth of the Tchan-kas-an-data or Calumet or Big Sioux River; thence up the Missouri River to the mouth of the Pa-hah-wa-kan or East Medicine Knoll River; thence up said river to its head; thence in a direction to the head of the main fork of the Wan-dush-kah-for or Snake River; thence down said river to its junction with the Tchan-san-san or Jaques or James River; thence in a direct line to the northern point of Lake Kampeska; thence along the northern shore of said lake

and its outlet to the junction of said outlet with the said Big Sioux River; thence down the Big Sioux River to its junction with the Missouri River."

And they also cede and relinquish to the United States all their right and title to and in all the islands of the Missouri River, from the mouth of the Big Sioux to the mouth of the Medicine Knoll River.

And the said chiefs and delegates hereby stipulate and agree that all the lands embraced in said limits are their own, and that they have full and exclusive right to cede and relinquish the same to the United States.

ARTICLE 3.

The said chiefs and delegates hereby further stipulate and agree that the United States may construct and use such roads as may be hereafter necessary across their said reservation by the consent and permission of the Secretary of the Interior, and by first paying the said Indians all damages and the fair value of the land so used for said road or roads, which said damages and value shall be determined in such manner as the Secretary of the Interior may direct. And the said Yanctons hereby agree to remove and settle and reside on said reservation within one year from this date, and, until they do so remove, (if within said year,) the United States guarantee them in the quiet and undisturbed possession of their present settlements.

ARTICLE 4.

In consideration of the foregoing cession, relinquishment, and agreements, the United States do hereby agree and stipulate as follows, to wit:

1st. To protect the said Yanctons in the quiet and peaceable possession of the said tract of four hundred thousand acres of land so reserved for their future home, and also their persons and property thereon during good behavior on their part.

2d. To pay to them, or expend for their benefit, the sum of sixty-five thousand dollars per annum, for ten years, commencing with the year in which they shall remove to, and settle and reside upon, their said reservation – forty thousand dollars per annum for and during ten years thereafter – twenty-five thousand dollars per annum for and during ten years thereafter – and fifteen thousand dollars per annum for and during twenty years thereafter; making one million and six hundred thousand dollars in annuities in the period of fifty years, of which sums the President of the United States shall, from time to time, determine what proportion shall be paid to said Indians, in cash, and what proportion shall be expended for their benefit, and, also, in what manner and for what objects such expenditure shall be made, due regard being had in making such determination to the best interests of said Indians. He shall likewise exercise the power to make such provision out of said sums as he may deem to be necessary and proper for the support and comfort of the aged or infirm, and helpless orphans of the said Indians. In case of any material decrease of said Indians, in number, the said amounts may, in the discretion of the

President of the United States, be diminished and reduced in proportion thereto – or they may, at the discretion of the President of the United States, be discontinued entirely, should said Indians fail to make reasonable and satisfactory efforts to advance and improve their condition, in which case, such other provisions shall be made for them as the President and Congress may judge to be suitable and proper.

3d. In addition to the foregoing sum of one million and six hundred thousand dollars as annuities, to be paid to or expended for the benefit of said Indians, during the period of fifty years, as before stated, the United States hereby stipulate and agree to expend for their benefit the sum of fifty thousand dollars more, as follows, to wit: Twenty-five thousand dollars in maintaining and subsisting the said Indians during the first year after their removal to and permanent settlement upon their said reservation; in the purchase of stock, agricultural implements, or other articles of a beneficial character, and in breaking up and fencing land; in the erection of houses, storehouses, or other needful buildings, or in making such other improvements as may be necessary for their comfort and welfare.

4th. To expend ten thousand dollars to build a school-house or school-houses, and to establish and maintain one or more normal-labor schools (so far as said sum will go) for the education and training of the children of said Indians in letters, agriculture, the mechanic arts, and housewifery, which school or schools shall be managed and conducted in such manner as the Secretary of the Interior shall direct. The said Indians hereby stipulating to keep constantly thereat, during at least nine

months in the year, all their children between the ages of seven and eighteen years; and if any of the parents, or others having the care of children, shall refuse or neglect to send them to school, such parts of their annuities as the Secretary of the Interior may direct, shall be withheld from them and applied as he may deem just and proper; and such further sum, in addition to the said ten thousand dollars, as shall be deemed necessary and proper by the President of the United States, shall be reserved and taken from their said annuities, and applied annually, during the pleasure of the President to the support of said schools, and to furnish said Indians with assistance and aid and instruction in agricultural and mechanical pursuits, including the working of the mills, hereafter mentioned, as the Secretary of the Interior may consider necessary and advantageous for said Indians; and all instruction in reading shall be in the English language. And the said Indians hereby stipulate to furnish, from amongst themselves, the number of young men that may be required as apprentices and assistants in the mills and mechanic shops, and at least three persons to work constantly with each white laborer employed for them in agriculture and mechanical pursuits, it being understood that such white laborers and assistants as may be so employed are thus employed more for the instruction of the said Indians than merely to work for their benefit; and that the laborers so to be furnished by the Indians may be allowed a fair and just compensation for their services, to be fixed by the Secretary of the Interior, and to be paid out of the shares of annuity of such Indians as are able to work, but refuse or neglect to do so. And whenever the President of the United States shall become

satisfied of a failure, on the part of said Indians, to fulfil the aforesaid stipulations, he may, at his discretion, discontinue the allowance and expenditure of the sums so provided and set apart for said school or schools, and assistance and instruction.

5th. To provide the said Indians with a mill suitable for grinding grain and sawing timber; one or more mechanic shops, with the necessary tools for the same; and dwelling-houses for an interpreter, miller, engineer for the mill, (if one be necessary,) a farmer, and the mechanics that may be employed for their benefit, and to expend therefor a sum not exceeding fifteen thousand dollars.

ARTICLE 5.

Said Indians further stipulate and bind themselves to prevent any of the members of their tribe from destroying or injuring the said houses, shops, mills, machinery, stock, farming-utensils, or any other thing furnished them by the Government, and in case of any such destruction or injury of any of the things so furnished, or their being carried off by any member or members of their tribe, the value of the same shall be deducted from their general annuity; and whenever the Secretary of the Interior shall be satisfied that said Indians hae become sufficiently confirmed in habits of industry and advanced in the acquisition of a practical knowledge of agriculture and the mechanic arts to provide for themselves, he may, at his discretion, cause to be turned over to them all of the said houses and other property furnished them by the United States, and dispense with the services of any or all

persons hereinbefore stipulated to be employed for their benefit, assistance, and instruction.

ARTICLE 6.

It is hereby agreed and understood that the chiefs and headmen of said tribe may, at their discretion, in open council, authorize to be paid out of their said annuities such a sum or sums as may be found to be necessary and proper, not exceeding in the aggregate one hundred and fifty thousand dollars, to satisfy their just debts and obligations, and to provide for such of their half-breed relations as do not live with them, or draw any part of the said annuities of said Indians: Provided, however, That their said determinations shall be approved by their agent for the time being, and the said payments authorized by the Secretary of the Interior: Provided, also, That there shall not be so paid out of their said annuities in any one year, a sum exceeding fifteen thousand dollars.

ARTICLE 7.

On account of their valuable services and liberality to the Yanctons, there shall be granted in fee to Charles F. Picotte and Zephyr Rencontre, each, one section of six hundred and forty acres of land, and to Paul Dorian one-half a section; and to the half-breed Yancton, wife of Charles Reulo, and her two sisters, the wives of Eli Bedaud and Augustus Traverse, and to Louis Le Count, each, one-half a section. The said grants shall be selected in said ceded territory, and shall not be within said reservation, nor shall they interfere in any way with the improvements of such persons as are on the lands ceded

above by authority of law; and all other persons (other than Indians, or mixed-bloods) who are now residing within said ceded country, by authority of law, shall have the privilege of entering one hundred and sixty acres thereof, to include each of their residences or improvements, at the rate of one dollar and twenty-five cents per acre.

ARTICLE 8.

The said Yancton Indians shall be secured in the free and unrestricted use of the red pipe-stone quarry, or so much thereof as they have been accustomed to frequent and use for the purpose of procuring stone for pipes; and the United States hereby stipulate and agree to cause to be surveyed and marked so much thereof as shall be necessary and proper for that purpose, and retain the same and keep it open and free to the Indians to visit and procure stone for pipes so long as they shall desire.

ARTICLE 9.

The United States shall have the right to establish and maintain such military posts, roads, and Indian agencies as may be deemed necessary within the tract of country herein reserved for the use of the Yanctons; but no greater quantity of land or timber shall be used for said purposes than shall be actually requisite; and if, in the establishment or maintenance of such posts, roads, and agencies, the property of any Yancton shall be taken, injured, or destroyed, just and adequate compensation shall be made therefor by the United States.

ARTICLE 10.

No white person, unless in the employment of the United States, or duly licensed to trade with the Yanctons, or members of the families of such persons, shall be permitted to reside or make any settlement upon any part of the tract herein reserved for said Indians, nor shall said Indians alienate, sell, or in any manner dispose of any portion thereof, except to the United States. Whenever the Secretary of the Interior shall direct, said tract shall be surveyed and divided as he shall think proper among said Indians, so as to give to each head of a family or single person a separate farm, with such rights of possession or transfer to any other member of the tribe or of descent to their heirs and representatives as he may deem just.

ARTICLE 11.

The Yanctons acknowledge their dependence upon the Government of the United States, and do hereby pledge and bind themselves to preserve friendly relations with the citizens thereof, and to commit no injuries or depredations on their persons or property, nor on those of members of any other tribe or nation of Indians; and in case of any such injuries or depredations by said Yanctons, full compensation shall, as far as possible, be made therefor out of their tribal annuities, the amount in all cases to be determined by the Secretary of the Interior. They further pledge themselves not to engage in hostilities with any other tribe or nation, unless in self-defence, but to submit, through their agent, all matters of dispute and difficulty between themselves and other Indians for

the decision of the President of the United States, and to acquiesce in and abide thereby. They also agree to deliver, to the proper officer of the United States all offenders against the treaties, laws, or regulations of the United States, and to assist in discovering, pursuing, and capturing all such offenders, who may be within the limits of their reservation, whenever required to do so by such officer.

ARTICLE 12.

To aid in preventing the evils of intemperance, it is hereby stipulated that if any of the Yanctons shall drink, or procure for others, intoxicating liquor, their proportion of the tribal annuities shall be withheld from them for at least one year; and for a violation of any of the stipulations of this agreement on the part of the Yanctons they shall be liable to have their annuities withheld, in whole or in part, and for such length of time as the President of the United States shall direct.

ARTICLE 13.

No part of the annuities of the Yanctons shall be taken to pay any debts, claims, or demands against them, except such existing claims and demands as have been herein provided for, and except such as may arise under this agreement, or under the trade and intercourse laws of the United States.

ARTICLE 14.

The said Yanctons do hereby fully acquit and release the United States from all demands against them on the part of said tribe, or any individual thereof, except the beforementioned right of the Yanctons to receive an annuity under said treaty of Laramie, and except, also, such as are herein stipulated and provided for.

ARTICLE 15.

For the special benefit of the Yanctons, parties to this agreement, the United States agree to appoint an agent for them, who shall reside on their said reservation, and shall have set apart for his sole use and occupation, at such a point as the Secretary of the Interior may direct, one hundred and sixty acres of land.

ARTICLE 16.

All the expenses of the making of this agreement, and of surveying the said Yancton reservation, and of surveying and marking said pipe-stone quarry, shall be paid by the United States.

ARTICLE 17.

This instrument shall take effect and be obligatory upon the contracting parties whenever ratified by the Senate and the President of the United States.

Source: April 19, 1858, 11 Stat 743;
Ratified February 16, 1859;
Proclamation February 26, 1859.

AGREEMENT WITH THE YANKTON SIOUX OR DAKOTA INDIANS, IN SOUTH DAKOTA

Sec. 12. The following agreement, made by J.C. Adams and John J. Cole, commissioners on the part of the United States, with the chiefs, headmen, and other male adults of the Yankton tribe of Sioux or Dakota Indians upon the Yankton Reservation, in the State of South Dakota, on the thirty-first day of December, eighteen hundred and ninety-two, and now on file in the Department of the Interior, and signed by said commissioners on behalf of the United States, and by Charles Martin, Edgar Lee, Charles Jones, Isaac Hepikigan, Stephen Cloud Elk, Edward Yellow Bird, Iron Lingthing, Eli Brockway, Alex Brunot, Francis Willard, Louis Shunk, Joseph Caje, Albion Hitika, John Selwyn, Charles Ree, Joseph Cook, Brigham Young, William Highrock, Frank Felix, and Philip Ree, on behalf of the said Yankton tribe of Sioux Indians, is hereby accepted, ratified, and confirmed.

ARTICLES OF AGREEMENT

Whereas J.C. Adams and John J. Cole, duly appointed commissioners on the part of the United States, did, on the thirty-first day of December, eighteen hundred and ninety-two, conclude an agreement with the chiefs, headmen, and other male adults of the Yankton tribe of Sioux or Dacotah Indians upon the Yankton Reservation, in the State of South Dakota, which said agreement is as follows:

Whereas a clause in the act making appropriations for the current and contingent expenses of the Indian

Department, and for fulfilling treaty stipulations with various Indian tribes, for the fiscal year ending June thirtieth (30th), eighteen hundred and ninety-three (1893), and for other purposes, approved July 13th, 1892, authorizes the "Secretary of the Interior to negotiate with any Indians for the surrender of portions of their respective reservations, any agreement thus negotiated being subject to subsequent ratification by Congress;" and

Whereas the Yankton tribe of Dacotah – now spelled Dakota and so spelled in this agreement – or Sioux Indians is willing to dispose of a portion of the land set apart and reserved to said tribe, by the first article of the treaty of April (19th) nineteenth, eighteen hundred and fifty-eight (1858), between said tribe and the United States, and situated in the State of South Dakota:

Now, therefore, this agreement made and entered into in pursuance of the provisions of the act of Congress approved July thirteenth (13th), eighteen hundred and ninety-two (1892), at the Yankton Indian Agency, South Dakota, by J.C. Adams of Webster, S.D., John J. Cole of St. Louis, Mo., and I.W. French of the State of Neb., on the part of the United States, duly authorized and empowered thereto, and the chiefs, headmen, and other male adult members of said Yankton tribe of Indians, witnesseth:

ARTICLE I.

The Yankton tribe of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the

unallotted lands within the limits of the reservation set apart to said Indians as aforesaid.

ARTICLE II.

In consideration for the lands ceded, sold, relinquished, and conveyed to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians the sum of six hundred thousand dollars ($600,000), as hereinbefore provided for.

ARTICLE III.

Section 1. Sixty days after the ratification of this agreement by Congress, or at the time of the first interest payment, the United States shall pay to the said Yankton tribe of Sioux Indians, in lawful money of the United States, out of the principal sum stipulated in Article II, the sum of one hundred thousand dollars ($100,000), to be divided among the members of the tribe per capita. No interest shall be paid by the United States on this one hundred thousand dollars ($100,000).

Section 2. The remainder of the purchase money or principal sum stipulated in Article II, amounting to five hundred thousand dollars ($500,000), shall constitute a fund for the benefit of the said tribe, which shall be placed in the Treasury of the United States to the credit of the said Yankton tribe of Sioux Indians, upon which the United States shall pay interest at the rate of five per centum (5) per annum from January first, eighteen hundred and ninety-three (January 1st, 1893), the interest to be paid and used as hereinafter provided for.

ARTICLE IV.

The fund of five hundred thousand dollars ($500,000) of the principal sum, placed to the credit of the Yankton tribe of Sioux Indians, as provided for in Article III, shall be payable at the pleasure of the United States after twenty-five years, in lawful money of the United States. But during the trust period of twenty-five years, if the necessities of the Indians shall require it, the United States may pay such part of the principal sum as the Secretary of the Interior may recommend, not exceeding $20,000 in any one year. At the payment of such sum it shall be deducted from the principal sum in the Treasury, and the United States shall thereafter pay interest on the remainder.

ARTICLE V.

Section 1. Out of the interest due to the Yankton tribe of Sioux Indians by the stipulations of Article III, the United States may set aside and use for the benefit of the tribe, in such manner as the Secretary of the Interior shall determine, as follows: For the care and maintenance of such orphans, and aged, infirm, or other helpless persons of the Yankton tribe of Sioux Indians, as may be unable to take care of themselves; for schools and educational purposes for the said tribe; and for courts of justice and other local institutions for the benefit of said tribe, such sum of money annually as may be necessary for these purposes, with the help of Congress herein stipulated, which sum shall not exceed six thousand dollars ($6,000) in any one year: Provided, That Congress shall appropriate, for the same purposes, and during the same time, out of any

money not belonging to the Yankton Indians, an amount equal to or greater than the sum set aside from the interest due to the Indians as above provided for.

Section 2. When the Yankton tribe of Sioux Indians shall have received from the United States a complete title to their allotted lands, and shall have assumed all the duties and responsibilities of citizenship, so that the fund provided for in section 1 of this article is no longer needed for the purposes therein named, any balance on hand shall be disposed of for the benefit of the tribe as the Secretary of the Interior shall determine.

ARTICLE VI.

After disposing of the sum provided for in Article V, the remainder of the interest due on the purchase money as stipulated in Article III shall be paid to the Yankton tribe of Sioux Indians semiannually, one-half on the thirtieth day of June and one-half on the thirty-first day of December of each year, in lawful money of the United States, and divided among them per capita. The first interest payment being made on June 30th, 1893, if this agreement shall have been ratified.

ARTICLE VII.

In addition to the stipulations in the preceding articles, upon the ratification of this agreement by Congress, the United States shall pay to the Yankton tribe of Sioux Indians as follows: To each person whose name is signed to this agreement and to each other male member of the tribe who is eighteen years old or older at the date of this

agreement, twenty dollars ($20) in one double eagle, struck in the year 1892 as a memorial of this agreement. If coins of the date named are not in the Treasury coins of another date may be substituted therefor. The payment provided for in this article shall not apply upon the principle sum stipulated in Article II, nor upon the interest thereon stipulated in Article III, but shall be in addition thereto.

ARTICLE VIII.

Such part of the surplus lands hereby ceded and sold to the United States as may now be occupied by the United States for agency, schools, and other purposes, shall be reserved from sale to settlers until they are no longer required for such purposes. But all other lands included in this sale shall, immediately after the ratification of this agreement by Congress, be offered for sale through the proper land office, to be disposed of under the existing land laws of the United States, to actual and bona fide settlers only.

ARTICLE IX.

During the trust period of twenty-five years, such part of the lands which have been allotted to members of the Yankton tribe of Indians in severalty, as the owner thereof can not cultivate or otherwise use advantageously, may be leased for one or more years at a time. But such leasing shall be subject to the approval of the Yankton Indian agent by and with the consent of the Commissioner of Indian Affairs; and provided that such leasing shall not in any case interfere with the cultivation

of the allotted lands by the owner thereof to the full extent of the ability of such owner to improve and cultivate his holdings. The intent of this provision is to compel every owner of allotted lands to cultivate the same to the full extent of his ability to do so, before he shall have the privilege of leasing any part thereof, and then he shall have the right to lease only such surplus of his holdings as he is wholly unable to cultivate or use advantageously. This provision shall apply alike to both sexes, and to all ages, parents acting for their children who are under their control, and the Yankton Indian agent acting for minor orphans who have no guardians.

ARTICLE X.

Any religious society, or other organization now occupying under proper authority for religious or educational work among the Indians any of the land under this agreement ceded to the United States, shall have the right for two years from the date of the ratification of this agreement within which to purchase the land so occupied at a valuation fixed by the Secretary of the Interior, which shall not be less than the average price paid to the Indians for these surplus lands.

ARTICLE XI.

If any member of the Yankton tribe of Sioux Indians shall within twenty-five years die without heirs, his or her property, real and personal, including allotted lands, shall be sold under the direction of the Secretary of the Interior, and the proceeds thereof shall be added to the

fund provided for in Article V for schools and other purposes.

ARTICLE XII.

No part of the principal or interest stipulated to be paid to the Yankton tribe of Sioux Indians, under the provisions of this agreement, shall be subject to the payment of debts, claims, judgments, or demands against said Indians for damages or depredations claimed to have been committed prior to the signing of this agreement.

ARTICLE XIII.

All persons who have been allotted lands on the reservation described in this agreement and who are now recognized as members of the Yankton tribe of Sioux Indians, including mixed-bloods, whether their white blood comes from the paternal or maternal side, and the children born to them, shall enjoy the undisturbed and peaceable possession of their allotted lands, and shall be entitled to all the rights and privileges of the tribe enjoyed by full-blood Indians.

ARTICLE XIV.

All allotments of lands in severalty to members of the Yankton tribe of Sioux Indians, not yet confirmed by the Government, shall be confirmed as speedily as possible, correcting any errors in same, and Congress shall never pass any act alienating any part of these allotted lands from the Indians.

ARTICLE XV.

The claim of fifty-one Yankton Sioux Indians, who were employed as scouts by General Alf. Sully in 1864, for additional compensation at the rate of two hundred and twenty-five dollars ($225) each, aggregating the sum of eleven thousand four hundred and seventy-five dollars ($11,475) is hereby recognized as just, and within ninety days (90) after the ratification of this agreement by Congress the same shall be paid in lawful money of the United States to the said scouts or to their heirs.

ARTICLE XVI.

If the Government of the United States questions the ownership of the Pipestone Reservation by the Yankton Tribe of Sioux Indians, under the treaty of April 19th, 1858, including the fee to the land as well as the right to work the quarries, the Secretary of the Interior shall as speedily as possible refer the matter to the Supreme Court of the United States, to be decided by that tribunal. And the United States shall furnish, without cost to the Yankton Indians, at least one competent attorney to represent the interests of the tribe before the court.

If the Secretary of the Interior shall not, within one year after the ratification of this agreement by Congress, refer the question of the ownership of the said Pipestone Reservation to the Supreme Court, as provided for above, such failure upon his part shall be construed as, and shall be, a waiver by the United States of all rights to the ownership of the said Pipestone Reservation, and the

same shall thereafter be solely the property of the Yankton tribe of the Sioux Indians, including the fee to the land.

ARTICLE XVII.

No intoxicating liquors nor other intoxicants shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the treaty between the said Indians and the United States, dated April 19th, 1858, and as afterwards surveyed and set off to the said Indians. The penalty for the violation of this provision shall be such as Congress may prescribe in the act ratifying this agreement.

ARTICLE XVIII.

Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.

ARTICLE XIX.

When this agreement shall have been ratified by Congress, an official copy of the act of ratification shall be

engrossed, in copying ink, on paper of the size this agreement is written upon, and sent to the Yankton Indian agent to be copied by letter press in the "Agreement Book" of the Yankton Indians.

ARTICLE XX.

For the purpose of this agreement, all young men of the Yankton tribe of Sioux Indians, eighteen years of age or older, shall be considered adults, and this agreement, when signed by a majority of the male adult members of the said tribe, shall be binding upon the Yankton tribe of Sioux Indians. It shall not, however, be binding upon the United States until ratified by the Congress of the United States, but shall as soon as so ratified become fully operative from its date. A refusal by Congress to ratify this agreement shall release the said Yankton Indians under it.

In witness whereof, the said J.C. Adams, John J. Cole, and J.W. French, on the part of the United States, and the chiefs, headmen, and other adult male Indians, on the part of the said Yankton tribe of Sioux or Dakota – spelled also Dacotah – Indians, have hereunto set their hands and affixed their seals.

Done at the Yankton Indian agency, Greenwood, South Dakota, this thirty-first day of December, eighteen hundred and ninety-two (Dec. 31st, 1892).

JAMES C. ADAMS, [SEAL.]
JOHN J. COLE, [SEAL.]

The foregoing articles of agreement having been read in open council, and fully explained to us, we, the undersigned, chiefs, headmen, and other adult male members

of the Yankton tribe of Sioux Indians, do hereby consent and agree to all the stipulations therein contained.

Witness our hands and seals of date as above.

Wicahaokdeun (William T. Selwyn), seal; and others:

Therefore,

Be it enacted by the Senate and House or Representatives of the United States of America in Congress assembled, That said agreement be, and the same hereby is, accepted, ratified, and confirmed.

That for the purpose of carrying the provisions of this Act into effect there is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of six hundred thousand dollars, or so much thereof as may be necessary, of which amount the sum of five hundred thousand dollars shall be placed to the credit of said tribe in the Treasury of the United States, and shall bear interest at the rate of five per centum per annum from the first day of January, eighteen hundred and ninety-three, said interest to be paid and distributed to said tribe as provided in articles five and six of said agreement. Of the amount herein appropriated one hundred thousand dollars shall be immediately available to be paid to said tribe, as provided in section one of article three of said agreement. There is also hereby appropriated the further sum of ten thousand dollars, or so much thereof as may be necessary, which sum shall be immediately available, to be paid to the adult male members of said tribe, as provided in article seven of said agreement. There is also hereby appropriated the further sum of

eleven thousand four hundred and seventy-five dollars, which sum shall be immediately available, to be paid as provided in article fifteen of said agreement: Provided, That none of the money to be paid to said Indians under the terms of said agreement, nor any of the interest thereon, shall be subject to the payment of any claims, judgments, or demands against said Indians for damages or depredations claimed to have been committed prior to the signing of said agreement.

That the lands by said agreement ceded, to the United States shall, upon proclamation by the President, be opened to settlement, and shall be subject to disposal only under the homestead and town-site laws of the United States, excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common-school purposes and be subject to the laws of the State of South Dakota: Provided, That each settler on said lands shall, in addition to the fees provided by law, pay to the United States for the land so taken by him the sum of three dollars and seventy-five cents per acre, of which sum he shall pay fifty cents at the time of making his original entry and the balance before making final proof and receiving a certificate of final entry; but the rights of honorably discharged Union soldiers and sailors, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States, shall not be abridged except as to the sum to be paid as aforesaid.

That the Secretary of Interior, upon proper plats and description being furnished, is hereby authorized to issue patents to Charles Picotte and Felix Brunot, and W.T.

Selwyn, United States interpreters, for not to exceed one acre of land each, so as to embrace their houses near the agency buildings upon said reservation, but not to embrace any buildings owned by the Government, upon the payment by each of said persons of the sum of three dollars and seventy-five cents.

That every person who shall sell or give away any intoxicating liquors or other intoxicants upon any of the lands by said agreement ceded, or upon any of the lands included in the Yankton Sioux Indian Reservation as created by the treaty of April nineteenth eighteen hundred and fifty-eight, shall be punishable by imprisonment for not more than two years and by a fine of not more than three hundred dollars.

Source: 28 Stat 286.

#20216-a-JKK
1999 SD 122

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * *

JAMES BRUGUIER, Petitioner and Appellant,

v.

JOSEPH CLASS, Warden,
South Dakota State Penitentiary, Appellee.

* * * *

APPEAL FROM THE CIRCUIT COURT OF
THE FIRST JUDICIAL CIRCUIT
CHARLES MIX COUNTY, SOUTH DAKOTA

* * * *

THE HONORABLE KATHLEEN K. CALDWELL
Judge

* * * *

JOHN M. WILKA of
Wilka, Haugen & Kirby, P.C. Attorney for petitioner
Sioux Falls, South Dakota and appellant.

MARK BARNETT
Attorney General

JOHN P. GUHIN
Deputy Attorney General
Pierre, South Dakota Attorneys for appellee.

* * * *

ARGUED JANUARY 13, 1999
OPINION FILED **09/01/99**

KONENKAMP, Justice.

[¶1.] In this appeal, we must again decide the status of certain lands lying within the 1858 boundaries of the Yankton Sioux Reservation. By habeas corpus petition, James Bruguier challenges state jurisdiction in Pickstown, the place of his criminal offense. The United States Supreme Court in South Dakota v. Yankton Sioux Tribe, 522 US 329, 118 SCt 789, 139 LEd2d 773 (1998) [*Yankton Sioux Tribe*], held that *unallotted* lands ceded to the United States were subject to state jurisdiction. Here we must decide the status of *allotted* lands, which have passed into non-Indian ownership. We conclude that this territory is not Indian country as defined by federal law, and therefore South Dakota properly maintains jurisdiction. We affirm the decision denying Bruguier's habeas petition.

A

[¶2.] A jury found James Bruguier guilty of first degree burglary on August 21, 1992. He later pleaded guilty to being a habitual offender. On appeal, we affirmed. State v. Bruguier, 510 NW2d 126 (SD 1993). He committed the burglary in Pickstown, South Dakota, which lies within the original 1858 boundaries of the Yankton Sioux Indian Reservation. His first petition for writ of habeas corpus was denied, but based on the U.S. District Court's decision in Yankton Sioux Tribe v. Southern Missouri Waste Management District, 890 FSupp 878 (DSD 1995), concluding that the 1858 Reservation remained intact, Bruguier filed a second petition. The circuit court also denied

that petition, based on our decision in State v. Greger, 1997 SD 14, 559 NW2d 854. While his appeal to this Court was pending, the United States Supreme Court decided *Yankton Sioux Tribe*, 522 US at 329, 118 SCt at 789. We then remanded his case for a decision on whether the burglary occurred on land retaining reservation or Indian country status under 18 USC § 1151.

[¶3.] The parties stipulated that the offense occurred on allotted land to which Indian title had been extinguished, but left to the habeas judge to decide whether the land remained Indian country under federal law. The court found that the place where the offense was committed lies on formerly allotted land, "the Indian title to which has been long extinguished [and] is now held in fee title by non-Indians."[1] Also, the court concluded the reservation had been disestablished and that no lands within the former 1858 boundaries now constitute a reservation under 18 USC § 1151; therefore, the offense did not occur in Indian country and state jurisdiction was proper. Bruguier's petition for writ of habeas corpus was denied. On the same day the circuit court signed its findings, the U.S. District Court ruled that the 1858 boundaries remain intact, thus by inference making Pickstown Indian country. Yankton Sioux Tribe v. Gaffey, 14 FSupp2d 1135 (DSD 1998) [*Gaffey*]. Bruguier now appeals.[2] Jurisdiction may

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[1] See the shaded Pickstown map in the *Gaffey* Joint Appendix, Volume V, at 1379, Briefs from Yankton Sioux Tribe, et al. v. Gaffey, et al., (8th Cir 1999) (Nos. 98-3893, -3894, -3896, -3900).

[2] In this instance, our review of the circuit court's decision is de novo as we are deciding "whether the established facts fall within the relevant legal definition." Falls v. Nesbitt, 966 F2d 375, 377 (8th Cir 1992).

be properly challenged through a habeas petition. Flute v. Class, 1997 SD 10, ¶ 8, 559 NW2d 554, 556 (citing Weiker v. Solem, 515 NW2d 827, 830 (SD 1994)).

B

[¶4.] The legal history of the Yankton Sioux Reservation is described in *Yankton Sioux Tribe*, 522 US at 329, 118 SCt at 789, and *Greger*, 1997 SD 14, ¶ 2, 559 NW2d at 854. We address only those particulars bearing on the present question. The Yankton Sioux Indian Reservation was created by the 1858 Yankton Treaty of Cession. *Greger*, 1997 SD 14, ¶ 3, 559 NW2d at 857. With the passage of the General Allotment (Dawes) Act in 1887, the Yankton Reservation was to be partitioned with parcels to be assigned to individual tribal members.[3] In 1892, the Tribe and the United States negotiated a second treaty, which Congress ratified in 1894. *Id.* ¶¶ 1, 4. By this agreement, for a "sum certain," the Tribe "ceded, sold, relinquished and conveyed" all its unallotted reservation lands to the United States. *Id.* ¶ 1.

[¶5.] After President Cleveland's proclamation opened the unallotted lands for settlement in 1895, the area filled with settlers. The history is recounted in the writings of

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[3] Professor Herbert Hoover points out that certain lots were earlier assigned or distributed to Yankton "families." In 1869, 177 80-acre lots were surveyed and in 1874, additional 40-acre lots were surveyed. The General Allotment Act invalidated all the "family" assignments and provided for "individual" allotments. Herbert Hoover, A Yankton Sioux Tribal Land History 5 (1995).

author and journalist, Adeline S. Gnirk.[4] In her retelling, the Chicago, Milwaukee & St. Paul Railroad secured a right-of-way in 1897 to extend its line through the opened reservation from Napa to the place where the town of Platte was later founded. The railbed was completed in 1900. Within a year four townsites originated along the railway: Wagner, Lake Andes, Geddes and Platte. Dante and Ravinia were soon added as railroad stops. The region was transformed. Typical perhaps is the rise of Lake Andes, which was platted in 1901 and formally established as a town in 1904.

> When inherited Indian lands commenced to be sold, a location was secured on Section 4, the present site. This land including the 80 acres then platted and the 120 acres adjoining had been allotted to John Arthur, or Sparrow Hawk. He died and in 1904 his only heirs, his wife Taniyawakanwin, and daughter Bessie Zitka Koyewin were induced to sell 80 acres of this land to the Lake Andes Townsite Company.

Gnirk, Papineau's Domain, *supra* note 4, at 143, *cited in Gaffey* Joint Appendix, at 765. Even during the twenty-five year trust period required by the Dawes Act, Article XI of the 1894 Act allowed for the sale of allotted lands on the death of certain allottees. By 1916, Lake Andes won a decade-long battle with the other railroad towns to become the county seat, replacing Wheeler. Construction on the new courthouse began in 1917. The town remains

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[4] A. Gnirk, The Epic of the Realm of Ree (1984); A. Gnirk, The Epic of the Great Exodus (1985); A. Gnirk, The Epic of Papineau's Domain (1986).

the county seat to this day. Its courthouse and law enforcement center both sit on formerly allotted land.

[¶6.] For the Yanktons, too, life changed dramatically.

> Immediately after initial allotment proceedings ended in 1894, agency officials divided the reservation into two farm jurisdictions to hasten the adjustment of adults. . . . [They were taught] techniques of using horse-drawn machinery, selective livestock breeding, dry farming on arid land, and maintaining agricultural equipment.

Herbert T. Hoover & Leonard R. Bruguier, The Yankton Sioux 46 (1988). Tribal government quickly faded and became nonexistent. Indeed, the agency Superintendent in 1903 "declared that tribal government by chiefs was a thing of the past." *Id.* at 53. Even the tribal business committee disappeared, until revived years later. *Id.* The Court of Indian Offenses, which dealt with crimes by Indians against Indians on allotted land, was abolished in 1909. As the habeas court found, "[o]f the approximately 260,000 acres originally allotted to Indians, by 1913, just twenty-one years later, the tribal members held only 70,000 acres. . . . They had thus divested themselves of over 190,000 acres. By 1930, tribal members owned only 43,358 acres." The federally supported agency boarding school closed in 1919 and its students transferred to county public schools. Yanktons were added to the county jury list and several were elected or appointed to county and local offices, including clerk of courts, constable, election judge and clerk.

[¶7.] The present character of the area reflects the turn of the century changes that followed the reservation opening. From the 262,000 acres originally allotted, only

about fifteen percent remain in Indian hands. "Today, the total Indian holdings in the region consist of approximately 30,000 acres of allotted land and 6,000 acres of tribal land." *Yankton Sioux Tribe*, 522 US at 339, 118 SCt at 796 (citing Indian Reservations: A State and Federal Handbook 260 (1986)).

C

[¶8.] Bruguier committed burglary at a home in the state-chartered municipality of Pickstown. Although a substantial portion of the site on which Pickstown rests is former allotment land, none of it is now held by the Tribe or in trust. Pickstown has its own unique origin. Named for General Lewis A. Pick of the Corps of Engineers, the town was established in 1946. The U.S. Army Corps of Engineers created it as part of the Fort Randall Dam project to accommodate workers and their families. *See generally* Flood Control Act of 1944, Pub L No 78-534, 58 Stat 887 (1944) (codified as amended at 16 USC § 460d (1976)).[5] To permit building hydroelectric and flood control dams on the Missouri River, supporting enactments authorized the taking of portions of certain Indian reservations, including the nearby Crow Creek Sioux and Lower Brule Reservations.[6] In those enactments the text

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[5] Also known as the Pick-Sloan Missouri River Basin program.

[6] *See* Act of October 3, 1962, Payment for Lands of Crow Creek Sioux Reservation, Pub L No 87-735, 76 Stat 704; Act of October 3, 1962, Payment for Lands of Lower Brule Sioux Reservation, Pub L No 87-734, 76 Stat 698; Act of September 2, 1958, Payment for Lands to Lower Brule Sioux Tribe, Pub L No

mentions taking "reservation" land. In contrast, the body of the eminent domain statute dealing with the Yankton Sioux refers to taking only "tribal and allotted lands," but the title in the original enactment (Pub L No 83-478) does refer to the Yankton Sioux Reservation.[7] *See* 43 USC § 1200e (68 Stat 453 (1954)) (authorizing expenditure to relocate tribal members "who reside or have resided, on tribal and allotted lands acquired by the United States for the Fort Randall Dam and Reservoir project"). This latter law also provided that "title to any lands acquired within Indian country pursuant to this section shall be taken in the name of the United States in trust for the Yankton Sioux Tribe or members thereof."

[¶9.] In 1957, by authority of the Federal Property and Administrative Services Act of 1949, Pub L No 63-152, 63 Stat 378, allowing disposal of surplus federal property to stimulate industrial development, Pickstown was designated by Congress as an area eligible, upon Indian request, for transfer without cost to an Indian tribe or other Indian entity. *See* 25 USC 463(d) (1997). Apparently,

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85-923, 72 Stat 1773; Act of September 2, 1958, Payment for Lands to Crow Creek Sioux Indians, Pub L No 85-916, 72 Stat 1766; Act of September 2, 1958, Oahe Dam and Reservoir Project, Pub L No 85-915, 72 Stat 1762 (Standing Rock Sioux Tribe); Act of September 3, 1954, Pub L No 83-776, 68 Stat 1191 (Oahe Dam – Cheyenne River Tribe); Act of October 29, 1949, Pub L No 81-437, 63 Stat 1026 (Garrison Dam – Fort Berthold Tribe).

[7] The title to this Act refers to the "Yankton Sioux Indian Reservation." Yet within the body of this enactment only Lower Brule and Crow Creek are referred to as reservations. Whereas, the body of this law refers to Yankton "tribal and allotted lands."

no transfer took place. In 1985, Congress relinquished this land to the municipal corporation serving the people of Pickstown.

> TRANSFER OF FEDERAL TOWNSITES
>
> (a)(1) Except as otherwise provided in this Act and notwithstanding any other provision of law, the Secretary of the Army shall transfer, without consideration and without warranty of any kind, all rights, title, and interests of the United States in each of the following described lands (including all improvements on such lands) to the municipal corporation serving the inhabitants of such land as soon as possible after the incorporation of such municipal corporation:
>
> * * *
>
> (B) The land referred to as Pickstown, South Dakota, consisting of 393 acres, more or less. . . .

Supplemental Appropriations Act of 1985, Pub L No 99-88, ch VI, 99 Stat 293, 317. This law was later amended "by striking out 'without warranty of any kind' and inserting in lieu thereof 'by warranty deed, said deed to include a covenant to defend title to the property.' " Water Resources Development Act of 1986, Pub L No 99-662, 100 Stat 4082, 4242.[8]

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[8] The amendment also conveyed an additional twenty-three acres of land used by Pickstown as a sanitary landfill. The Corps of Engineers retained a 9-acre tract where maintenance buildings and an office building are located. The office building houses the town's Post Office and Credit Union under lease. Also retained was a cold storage warehouse and immediate land located on a 16-acre tract.

[¶10.] We appreciate, of course, that a federally authorized townsite may still be Indian country if it exists within the boundaries of an Indian reservation, even after title has been transferred in fee to non-Indians. Seymour v. Superintendent of Washington State Penitentiary, 368 US 351, 358-59, 82 SCt 424, 428-29, 7 LEd2d 346 (1962). In addition, reservation land taken by eminent domain will not necessarily extinguish reservation boundaries. Lower Brule Sioux Tribe v. State of South Dakota, 711 F2d 809 (8th Cir 1983). Yet, when read together, these enactments appear incompatible with any conception of this region as part of an existing Indian reservation. No reference is made to taking "reservation" land from the Yankton Sioux in the various flood control takings statutes. And Congress must not have considered Pickstown Indian country taken in trust for the Yankton Tribe or its members, for it was not returned to them, but to the municipal corporation.

[¶11.] Nonetheless, the Federal Government has been inconsistent in its references to the Yankton Reservation over the past century. We think it prudent, therefore, to analyze the question further under traditional Indian law standards established by the Supreme Court. *See Yankton Sioux Tribe*, 522 US at 354, 118 SCt at 803 ("Congress and the Executive Branch have described the reservation in contradictory terms and treated the region in an inconsistent manner.").

D

[¶12.] "Interpretation of federal law is the proprietary concern of state, as well as federal, courts." Idaho v.

Coeur d'Alene Tribe of Idaho, 521 US 261, 275, 117 SCt 2028, 2037, 138 LEd2d 438 (1997). Indeed, the jurisdictional issue here is as vital to South Dakota as it is to the Yankton Sioux Tribe and the Federal Government; thus, it is proper for this Court to determine where state jurisdiction lies.[9] Whether land falls within a reservation or constitutes Indian country "depends upon the interpretation and application of federal law." *Seymour*, 368 US at 353, 82 SCt at 426.

> [O]nly Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.

Solem v. Bartlett, 465 US 463, 470, 104 SCt 1161, 1166, 79 LEd2d 443 (1984) (citing United States v. Celestine, 215 US 278, 285, 30 SCt 93, 94-95, 54 LEd 195 (1909)); *see also Yankton Sioux Tribe*, 522 US at 343, 118 SCt at 798 ("[O]nly Congress can alter the terms of an Indian treaty by diminishing a reservation."); DeCoteau v. District County Court for the Tenth Judicial Dist., 420 US 425, 444, 95 SCt 1082, 1092-93, 43 LEd2d 300 (1975) (after a reservation has been created "all tracts included within it remain a part of the reservation until separated therefrom by Congress");

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[9] For this reason, we have received and reviewed all the briefs and exhibits submitted to the Eighth Circuit Court of Appeals in Yankton Sioux Tribe v. Gaffey, Nos. 98-3893, -3894, -3896, -3900. The status of approximately 222,000 acres of formerly "allotted" land now owned by non-Indians in southern Charles Mix County is open to uncertainty.

Monroe Price & Robert Clinton, Law and the American Indian 96 (2d ed 1973) ("Once a reservation has been established, or a dependent Indian community shown to exist, it will remain Indian country until terminated by Congress, irrespective of the nature of the land ownership.").

[¶13.] Congressional intent to terminate a reservation is not "lightly found" and ambiguities are to be resolved against it. Hagen v. Utah, 510 US 399, 411, 114 SCt 958, 965, 127 LEd2d 252 (1994) (citations omitted); *see also DeCoteau*, 420 US at 444, 95 SCt at 1092-93. Intent to remove land from reservation status must be clearly manifested. *DeCoteau*, 420 US at 444, 95 SCt at 1093. Without unambiguous intent, the general rule that "doubtful expressions" are construed in a light most favorable to the Indians, applies to our review of statutory and treaty language. *Id.*

E

[¶14.] The Federal Government generally has jurisdiction over Indian country, along with the Indian Tribe inhabiting it. Alaska v. Native Village of Venetie Tribal Gov't, 522 US 520, 527 n 1, 118 SCt 948, 952 n 1, 140 LEd2d 30 (1998) [*Venetie*]. Bruguier contends that whatever their present ownership, all originally allotted lands maintain Indian country status under 18 USC § 1151(a), as they lie within the 1858 boundaries of the Yankton Sioux Indian Reservation.[10] He believes that nothing in the negotiations, the treaty, or the later development in

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[10] This was essentially the U.S. District Court's decision in *Gaffey*, 14 FSupp2d at 1135.

the territory suggests that sales of *allotted* land to non-Indians would diminish the reservation beyond what the sale of the *unallotted* land accomplished. On the other hand, the State argues, based on *Greger*, that the reservation was disestablished by the 1894 Act, leaving as Indian country only Indian retained allotments and tribally owned land.[11]

[¶15.] Our task is to decide whether Pickstown is Indian country. More precisely, the question is whether parcels originally allotted to individual Yanktons compose part of a permanent reservation under 18 USC § 1151(a), or whether only those allotments still held in Indian hands are Indian country under 18 USC § 1151(c).[12] Three categories of land qualify as Indian country under 18 USC § 1151. First, § 1151(a) includes as Indian country those

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[11] As we were only dealing with the question whether the sale of all unallotted lands shrunk the boundaries of the reservation, *Greger* found the reservation had been *diminished*, rather than *disestablished*.

[12] 18 USC § 1151 provides:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

lands within the boundaries of a reservation under United States Government jurisdiction. Second, § 1151(b) defines Indian country as "all dependent Indian communities" within the United States. We need not address this subsection as no one in this appeal contends the Pickstown site or any other place on similarly non-retained allotment land is a "dependent Indian community." Third, § 1151(c) includes as Indian country all Indian allotments that have not lost their Indian titles.[13]

[¶16.] In State ex rel. Hollow Horn Bear, 77 SD 527, 95 NW2d 181 (1959), we interpreted 18 USC § 1151 to mean that subsection (a) encompasses those areas within a reservation, and that subsection (c) applies to those lands standing outside reservation boundaries.

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[13] 18 USC § 1151 was enacted in 1948. The Reviser's Note to the statute indicates that the definition of Indian country was derived from "the latest construction of the term by the United States Supreme Court." 18 USC § 1151 reviser's note. Congress used language from United States v. McGowan, 302 US 535, 58 SCt 286, 82 LEd 410 (1938), United States v. Pelican, 232 US 442, 34 SCt 396, 58 LEd 676 (1914), United States v. Sandoval, 231 US 28, 34 SCt 1, 58 LEd 107 (1913), and Donnelly v. United States, 228 US 243, 33 SCt 449, 57 LEd 820 (1913). In *Pelican*, the Court decided whether an Indian allotment that was once part of the Colville Indian Reservation but was situated in a part of the reservation that had been opened to settlement by Congress was Indian country. 232 US at 444-45, 34 SCt at 397. The Colville Indian Reservation was included in the definition of Indian country, as it had "been segregated from the public domain." *Id.* at 445, 34 SCt at 397. The Court concluded that because the land was an allotment held in trust for an individual Indian, the federal government still retained criminal jurisdiction over this land, even though the land lay in the diminished part of the reservation. *Id.* at 447, 33 SCt at 398.

> If subsection (a) is to receive a literal interpretation a patent to allotted lands within the limits of such a reservation which operated to extinguish the Indian title would not remove such a tract from Indian country, but under subsection (c) such a patent would so operate. Hence, it seems logical to believe that the Congress intended subsection (a) to apply to the closed area of reservations, and (c) to apply to allotted lands in open territory.

Hollow Horn Bear, 77 SD at 533, 95 NW2d at 185. If the only Indian country remaining is land the Yankton Tribe acquired long after the 1894 Act, along with remaining Indian owned allotments under § 1151(c), then the Yankton Sioux Reservation may be considered congressionally terminated.

F

[¶17.] In *Yankton Sioux Tribe*, the Supreme Court ruled that "Congress diminished the Yankton Sioux Reservation in the 1894 Act, that the unallotted tracts no longer constitute Indian country, and thus . . . the State has primary jurisdiction over . . . lands ceded under the Act." 522 US at 358, 118 SCt at 805. The Court limited its holding to deciding only that the "unallotted, ceded lands were *severed* from the reservation[.]" *Id.* (emphasis added). Left undecided was whether there now exists any reservation boundary, and if so, where it lies. We conclude, the boundaries created in the 1858 Treaty no longer exist because no provision was made in the 1894 Act to delineate any boundary, as in the 1858 Treaty. In most

instances, when a reservation is diminished, its boundaries "shrink." *Solem*, 465 US at 471, 104 SCt at 1166. Indeed, the Supreme Court in *Yankton Sioux Tribe* found that the 1894 Act is "readily distinguishable from surplus land Acts that the Court has interpreted as maintaining reservation boundaries." 522 US at 345, 118 SCt at 799.

[¶18.] Even with the 1858 boundaries extinct, however, we still must return to the Supreme Court's traditional three-factor "analytical structure" to decide the status of the lands left unresolved in *Yankton Sioux Tribe*. *Hagen*, 510 US at 411, 114 SCt at 965.

> The most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands. We have also considered the historical context surrounding the passage of the surplus land Acts, although we have been careful to distinguish between evidence of the contemporaneous understanding of the particular Act and matters occurring subsequent to the Act's passage. Finally, "[o]n a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation."

Id. (internal citations omitted) (quoting *Solem*, 465 US at 471, 104 SCt at 1166-67). *Yankton Sioux Tribe* and *Greger* scrutinized these three factors. We need not repeat all their conclusions here. Instead, we will touch on those points deemed more ambiguous.

1. Statutory Language

[¶19.] Articles I and II of the 1894 Act provided that the Yankton Tribe did "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation" and that in consideration for the "lands ceded, sold, relinquished, and conveyed" the United States agreed to pay a sum certain of $600,000. *Yankton Sioux Tribe*, 522 US at 344, 118 SCt at 798; *Greger*, 1997 SD 14, ¶ 4, 559 NW2d at 858. Equivalent language signaled termination of the reservation in *DeCoteau*, where the Supreme Court noted that such terminology was "precisely suited" to such purpose. 420 US at 445, 95 SCt at 1093. Being the most probative evidence, this cession language manifests an almost irrebuttable presumption of congressional intent. *Greger*, 1997 SD 14, ¶ 1, 559 NW2d at 855-56. Yet, other clauses in the Act are less absolute. Are these so uncertain as to negate the nearly conclusive import of the cession language? To appreciate the idiom of the 1894 Act, it is first important to understand the genesis of the allotment system and the legal notion of Indian ownership of reservations at that time.

[¶20.] Many well-meaning reformers, legislators, and federal officials viewed reservations as interim solutions to eventual Native American assimilation. When compressed, they theorized, Indian "detribalization" and "Americanization" would take place.[14] Reservations,

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[14] As one historian expressed:

> For more than one-half century, sincere friends of the Indians had been advocating the individual ownership of land as the salvation of any Indian who

therefore, were expected to have a limited life span. Arrell Morgan Gibson, The American Indian, Prehistory to the Present, 452, 486, 489, 491 (DCHeath & Co 1980). The Dawes Act had the dual goal of hastening the "detribalizing" process and opening reservation land to "homeseekers." *Id.* at 494-95, 498, 506. *See also Solem*, 465 US at 468, 104 SCt at 1165 (surplus land acts anticipated imminent demise of reservations and were enacted partly to facilitate the process). It would end common ownership by tribes, as well as the tribal way of life.

> Under the practice of allotting lands in severalty to individual Indians, title to the allotted land was held in trust by the Government for the benefit of the allottee, or vested in the allottee subject to a restraint against alienation. Obviously, in either case tribal title is not involved.

Felix Cohen, Handbook of Federal Indian Law 7-8 (1st ed reprint 1986). The allotment system later proved a dreadful failure, but at the time it was assumed that, for the benefit of assimilation and civilization, Indian and non-

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> would accept it. Like other mistaken policies it was all part of the centuries-old aim of changing Indians into white people. Break up their natural grouping, whether by abolishing the government of advanced tribes or undermining the influence of primitive chiefs, and set each family alone on a farm to develop habits of industry and the pride of possession. . . . The Indians' friends also argued that only a fee simple title would protect their land from the insecurity of reservation and treaty guarantees.

Angie Debo, A History of the Indians of the United States 299 (UOkPress 1970).

Indian families would intersperse over the opened reservations, making tribal existence and governance obsolete. *Solem*, 465 US at 468, 104 SCt at 1165. These philosophic assumptions emerge in the negotiations between Government representatives and Yankton Tribe members, where both sides spoke of tribal life as soon to be outdated. *Yankton Sioux Tribe*, 522 US at 353, 118 SCt at 803 (citing Report of the Yankton Indian Commission (Mar 31, 1893), at 19, *reprinted in* S Exec Doc No 27, 53d Cong, 2d Sess, 9-11 (1894); S Misc Doc No 134, 53d Cong, 2d Sess, 1 (1894)).

[¶21.] The Government's notion of Indian ownership and how it legally ended can be seen in congressional enactments and early Supreme Court decisions. In 1834, Congress statutorily defined Indian country. It upheld the communal objective of tribal communities with the understanding that once title to Indian land was extinguished, the land was no longer in Indian ownership.

> That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be Indian country.

Act of June 30, 1834, Pub L No 23-161, 4 Stat 729. When the U.S. Code was revised, however, this section was not included, effectively repealing it. Cohen, *supra*, at 6. The definition, nevertheless, shows that even in early usage of the term Indian country, Congress intended it to include

only those lands to which Indian title had not been extinguished.

[¶22.] After repeal of 1834 definition of Indian country, the Supreme Court in Bates v. Clark, 95 US 204 (1887), defined the term:

> The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case.

Id. at 208; *see* Cohen, *supra*, at 7 (explaining the origin of the definition of Indian country). *See generally* Perrin v. United States, 232 US 478, 34 SCt 387, 58 LEd 691 (1914). In *Greger*, we observed that "*Perrin*'s notion of Indian country was consistent with the view at the time that reservations included 'only those lands in which the Indians held some form of property interest: trust lands, individual allotments, and, to a more limited degree, opened lands that had not yet been claimed by non-Indians.' " 1997 SD 14, ¶ 8, 559 NW2d at 860 (quoting *Solem*, 465 US at 468, 104 SCt at 1165). In sum, Indian title in common, or put another way, tribal title, ended when tribal ownership ended. *Yankton Sioux Tribe*, 522 US at 346, 118 SCt at 798, (citing *Solem*, 465 US at 468, 104 SCt at 1164) (tribal ownership coextensive Indian ownership).

[¶23.] Noteworthy in the 1894 Act is the absence of any provision for tribal ownership. No land was reserved

even for tribal purposes.[15] By eliminating tribal ownership, the "common understanding of the time" was that a "critical component of reservation status" was lost. *Yankton Sioux Tribe*, 522 US at 346, 118 SCt at 799. Individual Indians received their allotments and, except for agency and school land, all the rest was sold and opened for homesteads and townsites. It was not until the following century that Indian ownership and tribal ownership were legally distinguished in identifying Indian country. By then, of course, more tolerant and enlightened notions of preserving aboriginal self-determination and culture gained ascendancy. Congressional enactments suitably followed. Congress has "plenary power over Indian affairs, including the power to modify or eliminate tribal rights." *Id.* at 343, 118 SCt at 798 (citations omitted); *see also Sandoval*, 231 US at 46, 34 SCt at 5-6 ("Congress . . . has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease."). With this background in mind, we examine a few of the purportedly discrepant provisions in the 1894 Act.

[¶24.] The Supreme Court in *Yankton Sioux Tribe* expressed some misgivings on the import of certain language in Article VIII.

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[15] It was decades after the reservation was opened that the Tribe acquired land from the Government that the United States no longer needed. Act of February 13, 1929, Pub L No 70-729, 45 Stat 1167 (returning to Tribe 1000 acres titled in United States that had been reserved in the 1894 Act for "agency, school, and other purposes").

> Although we agree with the State that the school sections clause reinforces the view that Congress intended to extinguish the reservation status of the unallotted land, a somewhat contradictory provision counsels against finding the reservation terminated. Article [VIII] of the 1894 Act reserved from sale those surplus lands "as may now be occupied by the United States for agency, schools, and other purposes." In *Solem*, the Court noted with respect to virtually identical language that "[i]t is difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened area would remain part of the reservation." 465 U.S. at 474, 104 S.Ct. 1168.

Yankton Sioux Tribe, 522 US at 350, 118 SCt at 801. Reserving to the United States lands for agency, school and other purposes suggests continued Government support for tribal members, and possibly evinces the notion of a continuing reservation. Yet, the uncertainty of this provision cannot carry the significance it did in *Solem*. There, the critical cession language was not suited to finding intent to terminate the reservation.

[¶25.] In keeping with the Dawes Act's twenty-five year trust period following the allotting process, setting aside government land for school and agency purposes was common, even for a terminated reservation.[16] In the 1891 treaty with the Sisseton-Whapeton [sic] Tribes, it was understood that on the Lake Traverse Reservation, the United States would continue to own land for school and

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[16] After the opening, federal officials provided assistance to help the Yanktons' transition into agriculturists. *See* Hoover & Bruguier, *supra*, at 46.

agency purposes. *See DeCoteau*, 420 US at 435 n 16, 95 SCt at 1088 n 16 ("Government should own the lands upon which the agency and school building are located."); *id.* at 438 n 19, 95 SCt at 1089 n 19 (" 'Indian title' " to lands occupied by the " 'agency and missionary society' " will be " 'extinguished' " (citation omitted)). Moreover, reserving such "lands for Indian schools, religious missions, and service agencies" did not preclude finding congressional intent to disestablish a part of the Rosebud Reservation. *See* Rosebud Sioux Tribe v. Kneip, 430 US 584, 622, 97 SCt 1361, 1381, 51 LEd2d 660 (1977) (Marshall, J., dissenting).

[¶26.] Another provision that bears further scrutiny is Article XIV of the 1894 Act:

> All allotments of land in severalty to members of the Yankton tribe of Sioux Indians, not yet confirmed by the Government, shall be confirmed as speedily as possible, correcting any errors in same, and *Congress shall never pass any act alienating any part of these allotted lands from the Indians.*

(emphasis added). This, too, is consistent with the initial twenty-five year trust relationship. At the time of negotiations, much of the land to be allotted had yet to be processed. Though opposed to partitioning their land when the Dawes Act first passed, Yankton tribal members expressed concern during the 1892 negotiations with the slowness of the approval process. A history of broken promises and failures to deliver timely, adequate provisions as part of the 1858 Treaty created understandable Yankton skepticism about whether all the allotments would be distributed. Taken in context, this provision

simply assured that those entitled to allotted parcels would receive them as soon as possible, and once received, they would not be taken away. Nothing in this provision can be interpreted as precluding individual Indian owners from later transferring their property to non-Indians after the trust period expired.

[¶27.] Even if the more uncertain provisions of the 1894 Act cannot be wholly explained, congressional intent to end the Yankton Reservation is sufficiently clear in its "precisely suited" cession language. As the Supreme Court noted with respect to the Article XVIII saving clause, " 'it is a commonplace of statutory construction that the specific' cession and sum certain language in Articles I and II 'governs the general' terms. . . . " *Yankton Sioux Tribe*, 522 US at 348, 118 SCt at 800 (citation omitted).

2. Historical Context

[¶28.] Although there are inconsistencies in this sphere also, we find little in the historical context or the Treaty negotiations to suggest that the reservation would continue. "[T]he record of the negotiations between the Commissioners and the Yankton Tribe contains no discussion of the preservation of the 1858 boundaries. . . . " *Id.* at 347, 118 SCt at 800.

> [T]he Commissioners' report of the negotiations signaled their understanding that the cession of the surplus lands dissolved tribal governance of the 1858 reservation. They observed that "now that [members of the Tribe] have been allotted their lands in severalty and have sold their surplus land – the last property bond which

> assisted to hold them together in their tribal interest and estate – their tribal interests may be considered a thing of the past." And, in a March, 1894, letter to the Chairman of the Senate Committee on Indian Affairs, several Yankton chiefs and members of the Tribe indicated that they concurred in such an interpretation of the agreement's impact. The letter urged congressional ratification of the agreement, explaining that the signatories "want[ed] the laws of the United States and the State that we live in to be recognized and observed," and that they did not view it as desirable to "keep up the tribal relation . . . as the tribal relation on this reservation is an obstacle and hindrance to the advancement of civilization."

Id. at 353, 118 SCt at 802-03 (internal and other citation omitted). Implicit in the negotiations was an opened area without boundaries; explicit was an end to tribal existence upon the distribution of allotments and the sale of unallotted lands. Without tribal existence, without communal land, the historical context points to an understanding that the reservation would no longer continue to exist. As the Supreme Court wrote in *Yankton Sioux Tribe*, "[i]n this case, although the context of the Act is not so compelling that, standing alone, it would indicate diminishment, neither does it rebut the 'almost insurmountable presumption' that arises from the statute's plain terms." 522 US at 351, 118 SCt at 802 (citation omitted).

3. Resultant Developments in the Area

[¶29.] We recognize that a "surge in non-Indian settlement" is the "least compelling" proof in our examination

of this question. *Id.* at 356, 118 SCt at 804. It was congressional intent in passing the 1894 Act that primarily controls the analysis and not the later movements of settlers and others. Yet we cannot ignore the palpable reality that, as the years passed after the 1895 opening, no one *behaved* as if the reservation remained in existence, not the Federal Government, not the Yankton Sioux, not the State, not the homesteaders, not the townspeople. However carefully we may pore over the thousands of words in treaty negotiations, in chronicles, in agency reports, in statutes, in latter day scholarly exegesis, we cannot ignore the historical actuality of what happened following the opening. The area was utterly transformed.

[¶30.] Following a recurrent theme, first came the settlers, then the railroads, then the towns, and businesses. This precipitous change in regional character is undeniable. If not dispositive of the question, it certainly has a persuasive bearing on our decision. Later actions may elucidate what Congress expected and here "the area remains 'predominantly populated by non-Indians with only a few surviving pockets of Indian allotments,' and those demographics signify a diminished reservation." *Id.* at 356-57, 118 SCt at 804 (quoting *Solem*, 465 US at 471 n 12, 104 SCt at 1167 n 12).

[¶31.] With the opening of the reservation came law and order administered by the State, with few exceptions.[17] No distinction was made between ceded lands and allotted lands that passed out of Indian hands. The "single

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[17] Those exceptions have to do with tribal police and federal officials dealing with matters on trust lands, which, as we know, quickly dwindled.

most salient fact [relating to later jurisdictional history] is the unquestioned actual assumption of state jurisdiction. . . . " *Rosebud Sioux Tribe,* 430 US at 603, 97 SCt at 1371. In *Yankton Sioux Tribe,* the Supreme Court considered this factor influential: "The State's assumption of jurisdiction over the territory, almost immediately after the 1894 Act and continuing unchallenged to the present day, further reinforces our holding." 522 US at 357, 118 SCt at 804. The only areas still treated as Indian country were the allotted lands, which remained under Indian ownership. Later, when the Tribe acquired certain lands, they were also considered out of the State's jurisdiction.

[¶32.] In the century following the opening of the reservation, the Yanktons themselves referred to their common land or "reservation" as a "mile square." *Greger,* 1997 SD 14, ¶ 5, 559 NW2d at 859. At the time of the 1894 Act, this "reservation" was federal agency land, as reserved in Article VIII, not tribal or common land. Even more significantly, both the 1932 Yankton Tribal Constitution and the amended Constitution of 1962 defined the Tribe's property as including only those tribal lands currently owned by the Tribe. Not until 1990 was the Yankton Constitution amended to encompass all lands and waters within the 1858 Treaty boundaries. This belated reclamation cannot overcome a century of development and reliance at odds with it, much less the congressional intent in the 1894 Act.

[¶33.] We see little evidence to depart from our previous conclusion on this point in *Greger.*

> Today, less than ten percent of the land within the 1858 Treaty boundaries is trust land. Over 600 miles of road in the area are maintained by

> county and township authorities. Only 22 miles are maintained by the Bureau of Indian Affairs. The state-chartered municipalities of Wagner, Lake Andes, Dante, Pickstown, Ravinia, and Marty all lie within the former boundaries. Non-Indians comprise over two-thirds of the population in the area.
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> * * *
>
> [I]f we accept defendant's arguments, over 6000 citizens of Charles Mix County would presently find they have become residents of an Indian reservation. This region has not been considered a reservation by the general populace.

Greger, 1997 SD 14, ¶¶ 29, 30, 559 NW2d at 867. Dante, Lake Andes and Ravinia are on former allotments. Pickstown and Wagner are partly situated on former allotments. The Charles Mix County seat (the courthouse and law enforcement center) are located on former allotment land.

[¶34.] Our Court has repeatedly held that South Dakota has jurisdiction over both ceded unallotted land and allotted parcels no longer titled in Indian ownership. In Wood v. Jameson, 81 SD 12, 18, 130 NW2d 95, 99 (1964), we discerned a congressional purpose "to disestablish the reservation and restore to the public domain the lands therein with the exception of allotments in severalty." Thus we concluded that an offense at Lake Andes was not committed within Indian country. In State v. Williamson, 211 NW2d 182, 184 (SD 1973), we held that "the Act of 1894 disestablished that portion of the Yankton Reservation which was ceded and sold to the United States," including the cities of Lake Andes and Wagner.

Cf. State v. Winckler, 260 NW2d 356, 360 (SD 1977) (Yankton Sioux Tribe Pork Plant at Wagner is trust land, thus, Indian country).

[¶35.] A conclusion that, despite present ownership, all originally allotted land is part of a reservation creates new federal, tribal and state jurisdictional lines within Charles Mix County and its communities that not only affect law enforcement matters, but innumerable other issues both momentous and mundane: taxation, licensing, voting, economic development, environmental protection. To turn back now, to hold that the reservation was not terminated when for so many years that has been legal conception of both Indians and non-Indians, would create a jurisdictional maze, and defeat "the justifiable expectations of the people living in the area." *Hagen*, 510 US at 421, 114 SCt at 970.

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[¶36.] Paralleling the Act of 1894 under consideration here is the 1891 Act terminating the Lake Traverse Indian Reservation as decided in *DeCoteau. Yankton Sioux Tribe*, 522 US at 344-45, 118 SCt at 798. It is difficult to find any jural distinction between the two reservation sales. Even in 1892, the negotiators for the Yankton agreement repeatedly referred back to the Sisseton-Whapeton [sic] agreement, expressing their intent to effect the same result. In the end, pursuant to the General Allotment Act, both reservations were, in the same time frame, parceled to individual Indians, and all unallotted lands were sold to

the United States. Both Acts used the same cession language: "cede, sell, relinquish and convey. . . . " The intent behind this language is unmistakably the same.

[¶37.] Like the 1891 Act, "[t]he 1894 Act contains the most certain statutory language, evincing Congress' intent to diminish the Yankton Sioux Reservation by providing for total cession and fixed compensation." *Yankton Sioux Tribe*, 522 US at 357, 118 SCt at 805; *see DeCoteau*, 420 US at 445-46, 95 SCt at 1093-94. In each instance, *all* unallotted lands were sold. With both treaties, the heart of the preamble language recited intent "to dispose of a portion of the land set aside and reserved" to them. On both reservations, the opened lands were subject to the homestead and townsite laws of the United States. In both cases, the United States retained an agency and schools. Most significantly, no land in common was retained, no boundaries were redefined, and the parcels allotted to Indians were in both instances spread randomly across the former reservations. *Yankton Sioux Tribe*, 522 US at 334-40, 118 SCt at 793-96; *DeCoteau*, 420 US at 428, 95 SCt at 1085. In both Acts, it was provided that "excepting the sixteenth and thirty-sixth sections . . . shall be reserved for common school purposes, and be subject to the laws of" the State. The proclamations opening the reservations each referred to a "schedule of lands within the . . . reservation. . . . " Upon opening the land for settlement, in both instances South Dakota assumed unchallenged jurisdiction in all areas except on trust lands. *Yankton Sioux Tribe*, 522 US at 357, 118 SCt at 804; *DeCoteau*, 420 US at 442, 95 SCt at 1092. The *DeCoteau* Court perceived these circumstances to signal congressional intent to terminate the reservation and restore the

land to the public domain. We believe the same intent is shown in the Yankton Reservation sale.

CONCLUSION

[¶38.] The place in Pickstown where Bruguier committed his crime lies on land within the original 1858 boundaries of the Yankton Sioux Reservation. This area was initially allotted to a member of the Yankton Sioux Indian Tribe, but was later sold in fee to a non-Indian. Pickstown was created in 1946 as a federal reserve for the U.S. Army Corps of Engineers. Congress later relinquished ownership of this townsite to Pickstown's municipal corporation. It appears that Congress did not consider this area Indian country or an existing Indian reservation. Nonetheless, to comply with Supreme Court jurisprudence in deciding if this area is Indian country, we further considered the matter under the traditional principles the Court instituted.

[¶39.] Our analysis requires us to interpret a Nineteenth Century treaty, negotiated, enacted and enforced under outmoded values and discarded beliefs. In *Greger*, we refrained from interpreting the 1894 Act any broader than necessary. The Supreme Court in *Yankton Sioux Tribe* likewise decided only that the ceded portion of the reservation was diminished. Today we proceed further to decide the jurisdictional status of former allotments.

[¶40.] We conclude that Pickstown is not Indian country under 18 USC § 1151. It is not situated within the boundaries of a reservation because the Yankton Sioux Reservation was effectively terminated by the 1894 Act. Nor is it trust land, a dependent Indian community, or property

held by the Tribe. Consequently, the State properly exercised jurisdiction over Bruguier and the circuit court correctly denied his habeas corpus petition.

[¶41.] Affirmed.

[¶42.] MILLER, Chief Justice, and SABERS, AMUNDSON, and GILBERTSON, Justices, concur.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-3893/3984/3896/3900SDSF

Yankton Sioux Tribe, et al.,	*	Appeal from the
	*	United States
Appellee,	*	District Court for
	*	the District of
vs.	*	South Dakota
	*	
Matt Gaffey, et al.,	*	
	*	
Appellants,	*	

The motion to enlarge the record is denied without prejudice to the rights of the parties to seek to introduce the materials in the district court on remand.

(5120-010199)

December 9, 1999

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit